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Diversified Holdings, L.C. v. Gilbert R. Turner, Richard M. Knapp, University Properties, Inc., a Utah Corporation, the Haws Companies, a Utah Corporation, dba the Haws Companies Real Estate Services, Robert M. West, Jr., and John Does 1 through 4 : Brief of Appellant

Utah Supreme Court

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Blake S. Atkin; Atkin & Hawkins; Johnathan L Hawkins; Attorneys for Appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH
450 South State Street, Salt Lake City, Utah 84111

DIVERSIFIED HOLDINGS, L.C., **Plaintiff and Appellee and Cross Appellant,** **vs.** **GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah Corporation, THE HAWS COMPANIES, a Utah Corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR., and JOHN DOES 1 through 4,** **Defendants and Appellants and Cross Appellee.**	**Supreme Court No. 20000730** **Priority No. 15**

BRIEF OF APPELLANTS

Appeal from an Judgment of the Fourth Judicial District Court in and for Utah County, State of Utah
Honorable James R. Taylor, District Court Judge

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JURISDICTION

Jurisdiction of this Court is pursuant to the provisions of Utah Code Ann. §78-2-2(j) (1953), as amended.

ISSUES PRESENTED

The issues presented for resolution are as follows:

ISSUE 1: **Election of Remedies Issue:** Whether the trial court erred by failing to recognize that plaintiff by affirming the contractual transaction which contained an integration clause, thereby retaining the benefits of the bargain and not avoiding the fraudulently induced contract, elected certain remedies and was, therefore, precluded from recovering damages beyond a breach of the terms of the contract.

Standard of Review: The application of law to facts poses a question of law, which this Court reviews for correctness and without deference to the lower court's conclusions. Zoll & Branch, P.C. v. Asay, 932 P. '); State v. Pena, 869 P. 2d (Utah 1994); Bonham re Adoption of A.B., 1999 UT App. 315, 991 P. 38, ¶14-15, 986 P.2d 115; DeLand v. Uintah Cou. 97).

The issue was preserv cript ("T.T.") at 11-12), and was specifically addr

ISSUE 2: **Excessive Puniti** rt erred by failing to remit the pur. ..xtent than remitted on the following two cor ... of alternative grounds:

(i) The trial court erred by failing to aggregate the amount of punitive damages applicable to all defendants before applying a ratio of actual fraud damages to punitive damages and thereby exceeded the ratio of 1 to 3 (or 1 to 2 as may be appropriate). The ratio of actual fraud

damages which the trial court ultimately remitted the judgment to was 1 to 14.75, which is a ratio that still has the amount of punitive damages 5 to 8 times greater than it should be under applicable law. The aggregate punitive damages were remitted to $1,052,757.00. The actual fraud damages were $71,336.00. [$1,052,757.00 ÷ $71,336.00 = 14.757724.]

(ii) The trial court erred by failing to remit the punitive damages in an additional amount inasmuch as the facts of the matter attributing punitive damages do not justify a ratio of actual fraud damages to punitive damages of greater than 1 to 3 (or 1 to 2 as may be appropriate).

Standard of Review: A determination of whether or not the trial court appropriately remitted the amount of a judgment in conformance with standards set by the Supreme Court of the State of Utah is determined under an abuse of discretion standard and correctness standard. See Crookston v. Fire Insurance Exchange, 860 P. 2d 937, 938 (Utah 1993), where the claim made on appeal was that the trial court failed to apply the standards articulated by the Utah Supreme Court for the remittitur of excessive punitive damages when a jury had determined punitive damages that were greater than 3 (or 2) times the amount of the actual damages.

The issue was preserved for appeal in the trial court (Record ("R.") at 1631), and was specifically addressed by the trial court Def. Memorandum in Support of Motion for New Trial, (R. at 1629).

ISSUE 3: **Double Recovery Issue:** Whether the trial court erred when it allowed the jury to determine punitive damages separately for defendant Richard M. Knapp and defendant University Properties, Inc., when the evidence showed that University Properties, Inc., was an entity owned almost entirely by defendant, officer and employee, Richard M. Knapp and the actions of the entity were entirely the actions of defendant, officer and employee, Richard M.

Knapp? In other words, whether the trial court allowed an impermissible double recovery by allowing the plaintiff to recover punitive damages from the employer (University Properties, Inc.; $214,000.00)) for the acts of the officer and employee (Richard M. Knapp; $500,000.00), to whom punitive damages were also assessed?

Standard of Review: The application of law to facts poses a question of law, which this Court reviews for correctness and without deference to the lower court's conclusions. Zoll & Branch, P.C. v. Asay, 932 P. 2d 592 (Utah 1997); State v. Pena, 869 P. 2d (Utah 1994); Bonham v. Morgan, 788 P. 2d 497 (Utah 1989); In re Adoption of A.B., 1999 UT App. 315, 991 P. 2d 70; State ex rel. H.J., 1999 UT App. 238, ¶14-15, 986 P.2d 115; DeLand v. Uintah County, 945 P.2d 172, 174 (Utah Ct. App.1997).

The issue was preserved for appeal in the trial court (R. at 1741) and was specifically addressed by the trial court (R. at 1774)

ISSUE 4: **Admissibility of Evidence Issue:** Whether the trial court erred by failing to allow evidence of the resale of the property and defendant Knapp's tender of recission? Evidence of the resale of the property would have allowed the jury to see that the purchase of the property that the defendant fraudulently induced the plaintiff to purchase ultimately redounded to the plaintiff's financial benefit. Evidence of a tender of recission would demonstrate the defendant Knapp's good faith.

Standard of Review: The selection, interpretation and application of a particular rule of evidence are reviewed under the correction of error standard and without deference to the lower court's conclusions. Utah Department of Transportation v. 6200 South Associates, 872 P. 2d 462, 464 (Utah Ct. App. 1994). When the rule of evidence requires the balancing of factors then an abuse of discretion standard applies. Id., See also, Carpet Barn v. State of Utah, 786 P. 2d 770 (Ut. Ct. App. 1990).

The issue was preserved for appeal in the trial court (R. at 1854), and was specifically addressed by the trial court Def. Memorandum in Support of Motion for New Trial(Re: Excluded Evidence)(R at 1854).

ISSUE 5: **Release of Judgment Lien Issue:** Does a supersedeas bond provide adequate security under Utah Code Ann. §78-22-1, in order to terminate a judgment lien?

Standard of Review: The selection, interpretation and application of statutes are reviewed under the correction of error standard and without deference to the lower court's conclusions. Utah Department of Transportation v. 6200 South Associates, 872 P. 2d 462, 464 (Utah Ct. App. 1994).

The issue was preserved for appeal in the trial court (R. at 2331), and was specifically addressed by the trial court. Def. Motion For Order Terminating Judgment Lien (R. at 2331)

CONSTITUTIONAL PROVISIONS AND STATUTES DETERMINATIVE OF THE APPEAL

1. With Regard to Issue 1 (Election of Remedies Issue): This issue is a matter of first impression in the Utah Supreme Court. The determination of this matter will be a subject of common law.

2. With Regard to Issue 2 (Excessive Punitive Damages Issue):

United States Constitution, Amendment XIV:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law ... .

Constitution of Utah, Article I, Sec. 7:

No person shall be deprived of life, liberty or property, without due precess of

law.

3. With Regard to Issue 3 (Double Recovery Issue): The determination of this matter will be a subject of common law.

4. With Regard to Issue 4 (Admissibility of Evidence Issue): The determination of this matter will be a subject of common law.

5. With Regard to Issue 5 (Release of Judgment Lien Issue):

Utah Code Ann. §78-22-1(5) provides as follows:

> (5) (a) If any judgment is appealed, upon deposit with the court where the notice of appeal is filed of cash **or other security in a form and amount considered sufficient by the court that rendered the judgment** to secure the full amount of the judgment, together with ongoing interest and any other anticipated damages or costs, including attorney's fees and costs on appeal, the lien created by Subsection (2) shall be terminated as provided in Subsection (5)(b).
>
> (b) Upon the deposit of sufficient security as provided in Subsection (5)(a), the court **shall enter** an order terminating the lien created by the judgment under Subsection (2) and granting the judgment creditor a perfected lien in the deposited security as of the date of the original judgment.

STATEMENT OF THE CASE
(Introduction)

This is an appeal from a judgment (Copy attached as Appendix A) Fourth District Court, Provo Department, Honorable James R. Taylor, District Court Judge, presiding with a jury, rendered after trial whereupon a judgment was entered in favor of appellee Diversified Holdings, L. C. ("Diversified"), against appellants and cross-appellees Richard M. Knapp, University Properties, Inc., a Utah Corporation, and the Haws Companies, a Utah Corporation, dba the Haws Companies Real Estate Services (collectively referred to as

"Knapp"). The jury rendered its verdict whereupon the trial court, acting on motion, granted a remittitur of the punitive damages and negligence damages or, in the alternative, a new trial for Diversified. Div rsified choose to accept the remittitur. Knapp appealed. Diversified cross appealed. Knapp asserts in this appeal that: (i) Diversified is not entitled to damages for fraud as a matter of law inasmuch as Diversified affirmed the voidable contract under which it sought damages and (ii) if punitive damages are appropriate, that the amount of punitive damages granted remain excessive even though the trial court granted a remittitur. Diversified asserts in its cross appeal that the jury award ought to be reinstated.

STATEMENT OF FACTS

The following statement of facts is hereby made to aid the court. The statement is made with issues of fact decided in favor of the Diversified, which prevailed below.

A. Defendant University Properties ("University"), acting through defendant Richard Knapp ("Knapp") and the plaintiff Diversified Holdings ("Diversified") entered into negotiations for the purchase by Diversified of a parcel of improved real property from University that University expected to purchase from First Security Bank. Knapp was an officer and 90% owner of University.(R. at 2079) Turner, a licenced real estate salesman acted as the real estate salesman for the sale transaction between Diversified and University. Knapp was also a licenced as a real estate salesman.(T.T. at 339) However, Knapp did not disclose to Diversified that he was a licenced real estate salesperson whereas Turner at all times acted as a real estate sales person. (Id.)

B. University was in the process of purchasing the real property from First Security Bank.(T.T. at 204-306) The property, an office building, was in foreclosure sale by First Security Bank.(T.T. at 62-63) Knapp arranged for the purchase of the property by his company, University, for $700,000.00.(T.T. at 59). Turner represented to Diversified that the price at which University would sell the property to Diversified would be $10,000.00 greater than what University was to pay for the property from First Security Bank. (T.T. at 61) When asked, Turner feigned a lack of knowledge about the purchase price that University was to buy the property from First Security Bank and then pretended to call Knapp (Knapp was not on the other end of the telephone line) to set the re-sale price to Diversified.(Id.) Turner then told Diversified that the price at which University would sell the property to Diversified was $785,000.00.(T.T. at 62-63)

C. Knapp became aware prior to the sale of the property by University to Diversified that Turner had told Diversified that the price for the property of $785,000.00 was $10,000.00 over the price that University purchased the property from First Security Bank. Knapp did not correct the error, hoping that Diversified would not discover that the price from First Security Bank to University was $700,000.00.(T.T. at 333-340)

D. Diversified and University entered into a Earnest Money agreement for the purchase of the property by Diversified. (T.T. at 66-67) The Ernest Money Agreement between University and Diversified provided that the sales price would be $785,000.00 and contained the following language:

Paragraph L:

> COMPLETE AGREEMENT - NO ORAL AGREEMENTS. ***This instrument constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement.*** This Agreement cannot be changed except by mutual agreement of the parties.

(Id. Exhibit 13)(Emphasis added)[A copy of the Earnest Money Agreement is attached as Appendix C.]

E. Immediately after University obtained ownership of the property the property was resold to Diversified for the price of $785,000.00, as was provided for in the Earnest Money Agreement which was agreed to by University and Diversified.(T.T. at 72-73)

F. Upon sale, Knapp (and University) and Turner then split the profits from the sale of the real property which was the difference between the $700,000.00 which University purchased the property from First Security Bank and the $785,000.00 they sold the property to Diversified.(T.T. at 81)

G. There was no testimony or evidence of any corporate act of University taken by any person other than Knapp, who was an employee of University and its 90% shareholder.(R. at 2079, T.T. at 304)

H. Haws Companies ("Haws") was the real estate broker for Turner and Knapp and failed to supervise them at the time of the transaction and further failed to rectify the situation upon Haws discovery of the problem.(R. at 2075-2076)

I. Subsequently, Diversified learned that the property had been sold to University

by First Security Bank for $700,000.00. (T.T. at 79) Diversified learned that a wrong had been committed on it "within a couple of weeks afer closing." (Id.) At that time Diversified choose to affirm the sale of the property from University to Diversified and not rescind the transaction, which Diversified believed was it was fraudulently induced to enter. (R. at 1854) Consequently, Diversified retained the property and at the same time sued University, Knapp, Turner and Haws for fraud, claiming to be improperly induced into the purchase of the property. (Complaint; R. at 11)

J. The jury was not allowed to hear testimony that Diversified (by a successor) took the property that it had purchased in June 1992 for $785,000.00 and sold it in May 1996 for $1,200,000.00.(T.T. at 11-12) Further, the jury was precluded from hearing testimony that Knapp's tender of recission of the transaction was refused.(T.T. at 11-12)

K. Based upon the foregoing, the jury initially awarded the following damages to Diversified:

a. Defendant	b. Fraud[1]	c. Punitive	d. Ratio © to b)	e. Negligence	f. Total (b+c+e)
Turner	$71,336.00	$2,250,000.00	30.6 to 1	$84,000.00	$2,405,336.00
Knapp	$71,336.00	$1,750,000.00	23.8 to 1	$73,500.00	$1,821,336.00
University	$71,336.00	$1,000,000.00	13.6 to 1	$-0-	$1,071,000.00
Haws	$71,336.00	$130,500.00	1.7 to 1	$52,500.00	$254,336.00
Total:	**$71,336.00**	**$5,130,500.00**	**69.8 to 1**	**$210,000.00**	**$5,411,836.00**

[1] This amount is joint and several with all defendants.

(R. at 1657-1658)

The jury also determined the amount of a civil penalty based on the actions of the parties as follows:

DEFENDANT	AMOUNT OF PENALTY
Knapp	$60,946.00
University	$-0-
Turner	$41,502.00
Haws	$4,200.00
TOTAL:	**$106,648.00**

The statute under which these penalties are rendered is Utah Code Ann. §61-2-11. (R. at 2093) Diversified elected to forego the statutory penalties in lieu of the punitive damages awarded. (Id.)

L. The trial court judge reviewed the matter on a motion for new trial and remitted the judgment, offering Diversified a new trial or to accept the remitted judgment. The judgment in favor of Diversified and against the defendant's below was entered as follows:

a. Defendant	b. Fraud[2]	c. Punitive	d. Ratio (c to b)	e. Negligence	f. Total (b+c+e)
Turner	$71,336.00	$208,257.00	2.9 to 1	$26,000.00	$305,593.00
Knapp	$71,336.00	$500,000.00	7 to 1	$22,750.00	$594,086.00
University	$71,336.00	$214,000.00	3 to 1	$-0-	$285,336.00

[2] This amount is joint and several with all defendants.

Haws	$71,336.00	$130,500.00	1.8 to 1	$16,250.00	$218,086.00
Total:	$71,336.00	$1,052,757.00	14.75 to 1	$65,000.00	$1,403,101.00

Memorandum Decision (R. at 2072-2097) Interest was also allocated to the damages.

M. In granting the remittitur, Judge Taylor justified the amount of the remitted awards as follows: [A copy of the Memorandum Decision, June 12, 2000, is attached hereto as Appendix A]

(1) **With regard to negligence:** Judge Taylor reviewed the evidence before him and concluded that the judgment against Turner ($84,000.00), Knapp ($73,500.00) and Haws ($52,500.00) totaling $210,000.00 should be remitted to Turner ($26,000.00), Knapp ($22,750.00) and Haws ($16,250.00) totalling $65,000.00 based upon the following:

- The negligence "resulted in the failure of the defendants [Turner, Knapp and Haws] to professionally represent the Plaintiff as real estate professionals to obtain the most reasonable price possible for the property." (R. at 2095)

- If the purchase price from First Security Bank had been $650.000.00 (some evidence was presented that was a possible value of the property) then the difference between that amount and the amount paid ($785,000.00) would have been $135,000.00, but $70,000.00 of that amount would have been attributed by the jury to fraud, leaving only $65,000.00 in remaining damages that could be attributed to negligence. Id. No other evidence of damage was presented to the jury. (Id.)

- "'[A]dditional damages, if any, sustained by the plaintiff as a proximate result of negligence' cannot, therefore be sustained beyond the amount of $65,000.00."(Id.)

- The amount was allocated between Turner, Knapp and Haws.(R. at 2094)

[The Knapp appellants do not challenge the negligence award as remitted.]

(ii) With Regard to the punitive damages awarded in favor of Diversified and against Knapp in the amount of $1,750,000.00 the trial court concluded that a remittitur was appropriate remitting the amount to $500,000.00 based upon the following:

- "Knapp was the most wealthy of the [defendants]."(R. at 2081)
- "Knapp knowingly initiated and took advantage of the scheme to defraud [Diversified]."(Id.)
- "The circumstances surrounding the conduct were manipulated and utilized by Mr. Knapp to facilitate the fraud."(Id.)
- "Diversified was forced to spend more on the property than it wanted." (Id.)
- "Knapp and his business interests . . . are largely unaffected." (Id.)
- "Unless forced to change his business practices and outlook there is a substantial possibility that Mr. Knapp will seek to take advantage of similar circumstances in the future." (Id.)
- "Mr. Knapp accomplished much of the fraud in this case by creating and manipulating special relationships — particularly with other defendants." (Id.)
- "Damages awarded by the jury as compared to punitive damages were in the ratio of about 1 to 19 which substantially exceeds the Supreme Court guidelines." (Id.)
- Punitive damages are to be remitted to $500,000.00. That creates a ratio of punitive damages to actual damages of 5.3 to 1. To arrive at that ratio the court aggregated the fraud damages of $71,336.00 (which

is joint and several with Turner and Knapp) with the negligence damages of $22,500.00. (Id.)

(iii) With Regard to the punitive damages awarded in favor of Diversified and against University in the amount of $1,000,000.00 the trial court concluded that a remittitur was appropriate and remitted the amount to $214,000.00 based upon the following:

- The value of University was unknown but was included in the net worth of Knapp. (R. at 2079)
- University took all its actions through Knapp. (R. at 2078)
- The ratio of punitive damages to actual damages rendered by the jury was 14 to 1 and was excessive. (Id.)
- "[T]he misbehavior of the corporation completely resulted from the mis-deeds of Mr. Knapp." (R. at 2077)
- Punitive damages to actual damages are to be remitted to the ratio of 3 to 1. (Id.) To arrive at that ratio the fraud damages of $71,336.00 (which is joint and several with Turner and Knapp) were used solely inasmuch as there were no negligence damages awarded against University. (Id.)

(iv) With Regard to the punitive damages awarded in favor of Diversified and against Haws in the amount of $130,000.00 the trial court concluded that a remittitur was not appropriate and retained the amount awarded by the jury of $130,000.00 based upon the following:

- "Although the conduct of the Haws Companies was, at the time of the actual fraud, relatively benign and without malice, the company did not take advantage of the opportunity to correct the error but, instead acted to protect it's 'fee position' by seeking to collect real estate commissions and fire the agents [Turner and Knapp]."(R. at 2074)

- Punitive damages to actual damages was a ratio of 1.5 to 1.(Id.) To arrive at that ratio the fraud damages of $71,336.00 (which is joint and several with Turner and Knapp) were aggregated with the negligence damages of $16,250.00. (R. at 2077)

(v) With Regard to the punitive damages awarded in favor of Diversified and against Turner in the amount of $2,250,000.00 the trial court concluded that a remittitur was appropriate and remitted the amount to $208,257.00 based upon the following:

- "Mr. Turner appears to be the least wealthy of any of the Defendants." (R. at 2093)
- "No evidence was presented ... identifying any net worth of Mr. Turner." (Id.)
- "Mr. Turner's conduct ... was the core of the fraud that was perpetrated." (R. at 2092)
- Mr. Turner lied to Diversified. (Id.)
- Mr. Turner was a licenced real estate agent. (Id.)
- "[V]irtually all of the deception that occurred ... was carried out through the lies, statements and activity of Mr. Turner acting by himself or in concert with other defendants." (R. at 2091)
- Punitive damages to actual damages was a ratio of to 2 to 1.(Id.) To arrive at that ratio the fraud damages of $71,336.00 (which is joint and several with Haws, University and Knapp) were aggregated with the negligence damages of $26,000.00. (R. at 2077)

Diversified chose not to retry the matter and accepted the remittitur. (R.)

M. Supersedeas bonds were obtained from the Travelers Casualty and Security Company of America to secure the judgment as remitted against defendants\appellants

Richard M. Knapp, University Properties, Inc., The Haws Companies, dba The Haws Companies Real Estate Services.(R. at 2140, 2146). Copies of the bonds are attached hereto as Exhibit "A." [3] Those bonds were submitted to the court, signed by an attorney in fact for the bonding company, became part of the Court record below (R. at 2140, 2146) and provided as follows:

- "[Defendant and Travelers] are firmly held and bound unto Diversified Holdings, L.C., a Utah limited liability company, in the full and just sum of [the amount] for the payment of which, well and truly to be made, we and each of us bind ourselves, our successors, and assigns, jointly and severally, firmly by these presents." (Id.)

N. After objections were raised by Diversified that the bonds did not provide sufficient dollar coverage, the bonds were increased to cover the judgment amount *and* interest thereon.(R. at 2225-2235) Copies of the Increase Certificates by which the amount of the bonds were increased are attached hereto as Exhibit "B."

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[3] A concise chronology of relevant events is as follows:

DATE	EVENT
June 23, 2000	Notice of Submission of Bonds filed; Supersedeas bonds submitted by defendants Knapp, University and Haws
June 27, 2000	Objection to Supersedeas Bond submitted by plaintiffs
July 25, 2000	Judgment entered
Sept. 8, 2000	Notice of Submission of Increased Supersedeas Bond filed: Increased Supersedeas bonds submitted by defendants Knapp, University and Haws
Sept.12, 2000	Ruling; Trial court found that the Supersedeas Bonds, "as prepared and filed, are appropriate. The Objection to the form of the bonds [was] overruled."
Dec. 13, 2000	Order Terminating Judgment Lien entered.

O. The trial court concluded (Ruling dated September 12, 2000, a copy of which is attached hereto as Exhibit "C") that the judgment had been properly secured by way of the supersedeas bonds, such bonds being in a form and amount considered sufficient by the trial court, which had rendered the judgment in this matter.

P. No objection to the adequacy or sufficiency of the bonds were made below at the hearing on the Motion for Order Terminating Judgment Lien or in any effort to have the supersedeas bonds approved by the trial court, other than for the amount of the bonds, which was corrected by the Increase Certificates.(R.)

Q. Knapp, University and Haws moved the trial court pursuant to Utah Code Ann. §78-22-1(5) for an Order terminating the judgment lien created by the remitted judgment that had already been secured by the supersedeas bond.[4] Def. Motion For Order to Terminate Judgment Lien (R. at 2349) That Motion was granted by the trial court finding that

> [the trial] Court has previously determined that the Judgment herein . . . has been properly secured by way of supersedeas bonds filed herein, such bonds having been previously determined as being . . . in a form and amount considered sufficient by this Court, which had rendered the judgment in this matter...."Order Terminating Judgment Lien (R. at 2354)

A true and correct copy of the Order Terminating Judgment Lien is attached hereto as Exhibit "D."

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[4] The Motion asks that the lien specifically be released for certain property located in Summit County, State of Utah, inasmuch as the need for the release of that property is eminent. The release of all other liens is also effected by the Order Terminating Judgment Lien.

DETAILED AND MARSHALED STATEMENT OF FACTS

A detailed statement of facts in supplementation of the foregoing Concise Statement of Facts is as follows: See **Appendix "B"** and incorporated herein by reference.

SUMMARY OF ARGUMENT

Re: Election of Remedies: In this matter, the Court has the opportunity to determine a matter of first impression for this Court on whether or not an affirmed fraudulently induced contract containing a merger clause can be the basis for fraud and punitive damages. When Diversified choose (as was its right to do) to affirm the underlying contract certain consequences resulted from that choice. One of those consequences is that Diversified by accepting the contract also accepted the terms of the contract which included a clause that disclaimed any liability for any representation made in the course of entering into the contract, including any misrepresentation. That was a freely made choice of Diversified. Diversified could have just as easily chosen to declare the contract void and sought recission and thereby have all the remedies for fraud. However, weighting the alternatives, Diversified sought to enforce the contract. Knapp had no say in the course that Diversified choose. But once having made that choice, Diversified cannot now pick and choose which provisions to enforce and which top ignore. The contract contained the provision that the "instrument constitutes the entire agreement between the parties and supersedes and ***cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties***." As such, there can be no recognizable claim for fraud in this matter.

claim for fraud in this matter.

Re: Excessive Punitive Damages: If a fraud claim can be recog\nized by the court in this matter, the punitive damages rendered by the jury as reduced by the court through remittitur remain beyond the limits as established by guidelines of this Court and the United States Supreme Court, and therefore, are in violation of due process. Punitive damages must be reasonable. In this case the punitive damages in their remitted form are still significantly higher than what this Court has concluded is reasonable. If punitive damages are to be awarded they should be in the range of two times the actual damages, or a total of $142,672.00 [$71,336 x 2 = $142,672.00], not the $1,052,757.00.

Re: Double Recovery: Richard Knapp and his employer, University Properties (which Richard Knapp is a 90% owner) were both sued in the this matter. University operated solely through Richard Knapp in this matter. Nonetheless, a judgment was rendered against Richard Knapp for punitive damages in a separate and distinct amount and another judgment was rendered against University for punitive damages for another separate and distinct amount. The authorities are clear that when an entity acts only passively and only through the wrongdoing employee that there should only be one recovery, not two separate recoveries. Consequently, the judgment against University needs to be merged into the judgment against Richard Knapp and no further recovery obtained other tthan the amount against Richard Knapp.

Re: Failure to Receive Evidence: The jury was not allowed to receive some very important information at trial. That information would have allowed the jury to see

what, if any effect the "fraud" had on Diversified. The evidence would have shown that the wrongdoing had a substantial positive financial benefit to Diversified. Further, it would have shown that given the chance to nrescind and receive its money back, Diversified choose to stay with the deal it had struck, ultimately to its benefit.

Re: Release of Judgment Lien: Utah statutory law provides for the release of a judgment lien when the judgment is sufficiently secured. The supersedeas bonds procured in this matter provide that adequate security and, therefore, allow the trial court to release the judgment lien on real property.

ARGUMENT

POINT 1: DIVERSIFIED, HAVING CHOSEN TO AFFIRM THE ERNEST MONEY AGREEMENT THAT CONTAINED A MERGER CLAUSE, IS PRECLUDED AS A MATTER OF LAW FROM RECOVERY UNDER ANY TORT THEORIES.

This case is a matter of first impression in Utah on the topic of the effect of a merger clause on an affirmed, but fraudulently induced, contract. Other jurisdictions have addressed this situation. In those other jurisdictions the courts have concluded that when a party affirms a fraudulently induced contract that party remains bound by the terms of that contract and does not retain tort remedies for the inducement to enter the agreement. In other words, there are consequences associated with the affirmation of the agreement that are different from the consequences surrounding the voiding or disaffirming of the agreement. One consequence is that the affirmed agreement carries no tort (i.e. fraud) remedy.

A chart that graphically depicts the analysis contained in this section of the brief is

attached hereto as Appendix D. We suggest that a reference to that chart will be of great help to the Court.

The purpose of this section is to demonstrate to the Court that the fraud judgment rendered in favor of Diversified and against the appellants should be set aside in its entirety — Diversified affirmed the agreement and received exactly what the affirmed agreement provided.

A. Diversified affirmed the Ernest Money Agreement, which contained a merger clause.

In an action for fraud, the plaintiff has "the option to elect to rescind the transaction and recover the purchase price or to affirm the transaction and recover damages." Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980); see also Gardner v. Little, 2000 WL 137133, *3 (Miss. App. Feb. 8, 2000). "[S]tated in general terms, ... assuming the fact of fraud, a contract obligation obtained by fraudulent representation is not void, but voidable. Upon discovery thereof, the one defrauded must act promptly and finally to repudiate the agreement; however, a continuance to ratify the contract terms constitutes a waiver." Id. In the present case, Diversified never repudiated or dis-affirmed the agreement, but rather chose to affirm the transaction and keep all the benefits of the bargain..

Diversified knew of the wrongdoing perpetuated on it within just a couple of weeks of the closing of the property. Yet Diversified did nothing to avoid the contract. To the contrary, Diversified assumed complete and full ownership of the property. By affirming the transaction, Diversified was affirming the underlying contract, the Ernest Money Agreement.

Paragraph L of the Ernest Money Agreement states:

> COMPLETE AGREEMENT - NO ORAL AGREEMENTS. This instrument constitutes the entire agreement between the parties and supersedes and ***cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement.*** This Agreement cannot be changed except by mutual agreement of the parties.

(Emphasis added.) This paragraph is commonly referred to as a "merger clause" or an "integration clause." When a party chooses to affirm a contract that party, in essence, declares a willingness to be bound by the contract, and can enforce the contract and recover damages for breach of the contract. By affirmation the party does not pick and choose what provisions of the contract are to be enforceable and which are not. The contract is affirmed in whole.

B. The Merger clause in the affirmed Ernest Money Agreement has the legal effect of negating essential elements of a fraud claim, thereby precluding recovery under tort (including fraud) theories.[5]

Essential elements of a fraudulent misrepresentation claim include a representation

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[5] This is only the case here because of two key facts: 1) the underlying contract was affirmed, and 2) the underlying contract contained a merger clause. Where plaintiffs seek rescission of the contract, merger or integration clauses have no practical effect. See, e.g., DiFilippo v. Hidden Ponds Associates, 146 A.D.2d 737, 738, 537 N.Y.S.2d 222, 224 (N.Y.A.D. 1989) ("It is well settled that a general merger clause is ineffective to exclude parol evidence of fraud in the inducement in an action to rescind the contract"); Norton v. Poplos, 443 A.2d 1, 7 (Del. Supr. 1982) ("[I]f a sales contract contains a merger clause, a buyer may rescind the contract if it resulted from an innocent but material misrepresentation by a seller"); Wilkinson v. Carpenter, 276 Or. 311, 554 P.2d 512, 519 (Or. 1976) ("The contract containing such a provision [a merger provision] is voidable and itself subject to rescission"); Barnes v. Gould, 83 A.D.2d 900, 902, 442 N.Y.S.2d 150, 152 (N.Y.A.D. 1981) ("The presence of a general merger clause does not bar parol evidence of fraudulent representations in an action to rescind a contract").

and reliance upon that representation. Id, at 1246. Because of the merger clause contained in the Ernest Money Agreement, both the introduction of prior representations, as well as reliance thereon are effectively b arred. See, e.g., Marowitz v. Wieland, 532 S.E.2d 705 (Ga. App. March 27, 2000). That is precisely the situation in Marowitz v. Wieland, Id. There a purchaser affirmed a contract which he had been induced to enter by what he claimed was fraud. The court there concluded that "where a purchaser affirms a contract which contains a merger or disclaimer provision and retains the purchased item, he is estopped from asserting that he relied upon the seller's misrepresentation, and his action for fraud must fail." The court further concluded that "[t]he presence of a merger clause is determinative if the defrauded party has not rescinded but has elected to affirm the contract." Id. at 708.

In Crown Pontiac-GMC v. McCarrell, 695 So.2d 615, 618 (Ala. 1997), the Alabama Supreme Court concluded with regard to an affirmed fraudulently induced contract that "[m]erger clauses are enforceable under state contract law." In yet another case, Nelson v. Elway, 908 P.2d 102, 107 (Colo. 1995), the Colorado Supreme Court concluded that "the merger clauses preclude consideration of extrinsic evidence to ascertain the intent of the parties." There the court further provided that:

> Integration clauses generally allow contracting parties to limit future contractual disputes to issues relating to the express provisions of the contract. Therefore, the terms of a contract intended to represent a final and complete integration of the agreement between the parties are enforceable, and extrinsic evidence offered to prove the existence of prior agreements is inadmissible.

The rationale for such a requirement was recently articulated in Paden v. Murray, 240 Ga. App. 487,489, 523 S.E.2d 75, 68 (1999):

> Where a party who is entitled to rescind a contract on ground of fraud or false representations, and who has full knowledge of the material circumstances of the case, freely and advisedly does anything which amounts to a ***recognition of the transaction***, or acts in a manner inconsistent with a repudiation of the contract, ***such conduct amounts to acquiescence, and, though originally impeachable, the contract becomes unimpeachable in equity***.

(Emphasis added).

Therefore, "[d]epending upon which of the two actions is ultimately pursued, the presence of a merger clause in the underlying contract may be determinative as to the successful outcome. ***If the defrauded party has not rescinded but has elected to affirm the contract, he is relegated to a recovery in contract, and the merger clause will prevent his recovery.*** If, on the other hand, he does rescind the contract, the merger clause will not prevent his recovery under a tort theory." Cotton v. Bank South, 231 Ga. App. 812, 813-814, 499 S.E.2d 129 (1998) (Emphasis added).

The application of this rule of contract law was further discussed in Pennington v. Braxley, 224 Ga. App.344, 346-47, 480 S.E.2d 357,361 (1997), where a contract was induced by fraud, thereby making it voidable, but was nonetheless affirmed by the party so induced: The court reasoned:

> If the purchaser affirms the sales contract, he is bound by the contract's terms and is subject to any defenses which may be based on the contract. In the event the contract contains an entire agreement clause [merger clause], that clause operates as a disclaimer, establishing that the written contract completely and comprehensively represents all the parties' agreement. ***This clause then bars the purchaser from asserting reliance on the alleged misrepresentation not contained within the contract. Therefore, any fraud claim the purchaser might assert would be barred because reliance is an element essential to establishing fraud***. . . . By contrast, entire agreement clauses generally concern contractual liability, and provide that all oral representations have

> merged into the written contract. While an entire agreement provision may, in some instances, result in a waiver of claims, the parties to the contract have ultimate control over its impact by reducing all the vital terms of their contract to writing. Also, a party signing a contract containing an entire agreement clause is not absolutely bound by it. ***If that party later learns of a fraud that induced the contract but is not reflected in the contract's terms, the party has the choice of rescinding the contract and suing on the fraud or affirming the contract and being bound by its terms. The entire agreement clause will bar the fraud claim only in the latter instance.***

(Emphasis added). "This result obtains because where the allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he relied upon the other party's misrepresentation and his action for fraud must fail." Estate of Sam Farkas, Inc. v. Clark, 517 S.E.2d 826, 829 (Ga. App. 1999); Danann Realty Corp. v. Harris, 157 N.E. 2d 597, 599 (N.Y. 1959) (Court denied plaintiffs cause of action for fraud in the inducement over a sales contract that contained a merger clause noting that to do otherwise "businesspeople would be unable to draft a contract free from any reliance on representations").[6]

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[6] Diversified has argued that Dugan v. Jones, 615 P.2d 1239 (Utah 1980), stands for the proposition that when a party chooses to affirm a contract that was entered into based on fraudulent misrepresentations, they can sue for damages that were not part of the contract. The Dugan opinion simply does not support that argument. In the Dugan case, a buyer purchased 22 and 3/4 acres. The property was described as including 12 acres of native pasture and 8 acres of irrigated improved pasture. The written sale agreement specifically noted that the property being sold included 22 and 3/4 acres. After the closing, the buyer discovered that only 6.9 acres were actually conveyed or for sale stopped paying the seller. Seller thereafter commenced a foreclosure action over the property. The buyers countersued for damages based squarely on the contractual misrepresentation over the acreage.

The Utah Supreme Court held that the buyer could seek damages that would include the diminution in the value of the property actually bought (Supreme Court

The position that the appealing parties take in this matter is not that a merger clause prevents tort damages in all cases, such as when a aggrieved party rescinds a fraudulently induced agreement. However, when the party affirms that agreement he also affirms the merger clause and the fraud claim at that time losses its significance and no tort remedy exists. Only contract remedies exist after a contract is affirmed.

In this case, when the contract was affirmed by Diversified the essential elements of a misrepresentation and reliance thereon were subsumed by the merger clause. Therefore, Diversified's claim for fraudulent misrepresentation are barred by that merger clause contained in the Ernest Money Agreement. Consequently, the fraud claim must fail as a matter of law. For Diversified to have retained the fraud claims it would have had to have rescinded the transaction. Diversified did not rescind the tr ansaction with full knowledge of the inducement that it considered fraudulent.

POINT 2: IF PUNITIVE DAMAGES ARE APPROPRIATE IN THIS MATTER, THE AWARD OF PUNITIVE DAMAGES IS EXCESSIVE AND IS IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED

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ordered the trial court to use the "benefit of the bargain rule" id. at 1247), consequential damages as a result of not getting what was represented to be sold (id. at 1250), and punitive damages if these contractual misrepresentations were proven to be fraudulent (id. at 1246). However, all of the damages allowed by the Supreme Court were those that were squarely found in the contract that the buyers affirmed.

Accordingly, the Dugan v. Jones stands for the legal proposition that a party who affirms a contract may thereafter sue for damages for misrepresentations contained in the contract so affirmed. It does not stand for the proposition that a party who affirms a contract can thereafter sue for misrepresentations that never became part of the final contract that was affirmed.

STATES AND UTAH CONSTITUTIONS; THE PUNITIVE AWARDS SHOULD BE FURTHER REMITTED.

The award of punitive damages under the circumstances of this case is improper, as a matter of law inasmuch as Diversified affirmed the contract and thereby is precluded from any claim for fraud damages, thereby also precluding any claim for punitive damages. Punitive damages are not to be awarded in a fraud action[7] where the person defrauded chooses not to rescind the contract but rather to enforce the contract. Nevertheless, if

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[7] The Utah Supreme Court has established the nine elements of a fraud action. In Crookston v. Fire Ins. Exchange, 817 P. 2d 789, 800 (Utah 1991), the Court wrote:

> We have previously restated the elements of fraud as follows:
>
> (1) That a representation was made;
> (2) concerning a presently existing material fact;
> (3) which was false;
> (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he [or she] had insufficient knowledge upon which to base such representation;
> (5) for the purpose of inducing the other party to act upon it;
> (6) that the other party, acting reasonably and in ignorance of its falsity;
> (7) did in fact rely upon it;
> (8) and was thereby induced to act;
> (9) to his [or her] injury and damage.
>
> Pace v. Parrish, 122 Utah 141, 144-45, 247 P.2d 273, 274-75 (1952); see also Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982); Kohler v. Garden City, 639 P.2d 162, 166 (Utah 1981); Wright v. Westside Nursery, 787 P.2d 508, 512 (Utah Ct.App.1990). See generally 37 Am.Jur.2d Fraud and Deceit §§ 432-436 (1968). We also stated in Pace that the elements of fraud must be proven by "clear and convincing evidence." Pace, 122 Utah at 143, 247 P.2d at 274.

punitive damages are capable of being awarded in this matter, they are excessive and not in proportion to the wrong committed. The Due Process Clause of the United States Constitution and the constitutional and case law of the State of Utah all indicate that the award of punitive damages in this matter, even as already remitted by the trial court, is excessive. As such, at the very least an additional substantial remittitur should be granted by this Court.

The purpose of this section is to demonstrate to the Court that the judgment rendered in favor of Diversified and against the appellants, if sustainable at all, should be further remitted inasmuch as the judgment even as remitted by the trial court continues to evidence passion and prejudice in the award of punitive damages by the very size of the award.

A. United States Constitution Analysis.

The Due Process Clause of the United States Constitution "prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996). BMW marks the first time that the United States Supreme Court found a punitive damages award so excessive that it violated a party's substantive due process rights. See BMW, 517 U.S. at 585-86, 116 S.Ct. 1589. Under BMW, even if an assessment of punitive damages is not deemed excessive under governing state law, it may violate a party's substantive due process right to protection from "grossly excessive" punitive damages awards. See BMW, 517 U.S. at 568, 116 S.Ct. 1589; see also Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 430 n. 12, 116 S.Ct. 2211 (1996)(noting that BMW provides "an ultimate federal constitutional check for

exorbitancy" of punitive damages). Similarly, "like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment." Owens-Corning Fiberglass Corp. v. Malone, 972 S.W. 2d 35, 45 (Tex. 1996); see also Transportation Inc. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994).

BMW establishes three "guideposts" for determining whether a punitive damages award is unconstitutionally excessive:

(1) the degree of reprehensibility of the defendant's misconduct;

(2) the disparity between actual and punitive damages; and

(3) a comparison of the punitive damages awarded and other civil or criminal penalties that could be imposed for similar misconduct.

See BMW, 517 U.S. at 574-75, 116 S.Ct. 1589; see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20- 21, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1990).

1. Degree of Reprehensibility.

The degree of reprehensibility of the defendant's conduct should be considered. See BMW, 517 U.S. at 575, 116 S.Ct. 1589. Conduct that endangers a person's health or safety merits more punishment than purely economic harm. BMW, 517 U.S. at 576, 116 S.Ct. 1589; see also Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 639 (10th Cir.1996)("The appropriate penalty is no doubt below what would be justified if OXY's conduct caused loss of life, widespread health hazards, or major environmental injury.").

2. Ratio of compensatory to punitive damages.

The ratio of compensatory to punitive damages is also significant. See BMW, 517 U.S. at 575, 116 S.Ct. 1589; see also Alamo Nat. Bank v. Kraus, 616 S.W.2d 908, 910 (Tex.. 1981)("Exemplary damages must be reasonably proportioned to actual damages."). This is the "second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award...." BMW, 517 U.S. at 580, 116 S.Ct. 1589.[8]

3. Other Civil or Criminal Penalties.

A comparison of the punitive damage award with other civil or criminal penalties that could be imposed for comparable misconduct also provides a "indicium of excessiveness." BMW, 517 U.S. at 583, 116 S.Ct. 1589.

B. Utah Law Analysis.

The Utah Supreme Court has articulated the Utah position regarding the granting of punitive damages. Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991). Inasmuch as the opinion of the Utah Supreme Court was rendered in a fraud case and is so throughly stated, we will provide the Court with extensive quotes from the opinion. A chart depicting in a one page format all of the Utah Supreme Court and Utah Court of Appeals Court opinions since 1982 on remittitur of punitive damages for excessiveness is attached hereto as Appendix E.

1. **Factors for Assessing Amount of Punitive Damages: Punitive damages**

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[8] In BMW, the punitive damage award (even after reduction by the Alabama Supreme Court) was 500 times the amount of the actual damage award. See BMW, 517 U.S. at 582, 116 S.Ct. 1589.

must have some relationship to the facts and the amount of actual damages.

Under Utah law, certain factors are to be considered in assessing the amount of punitive damages to be awarded. Those include the following seven:

(i) the relative wealth of the defendant
(ii) the nature of the alleged misconduct
(iii) the facts and circumstances surrounding such conduct
(iv) the effect thereof on the lives of the plaintiff and others
(v) the probability of future recurrence of the misconduct
(vi) the relationship of the parties
(vii) the amount of actual damages awarded.

See Crookston at 808; Bundy v. Century Equip. Co., 692 P.2d 754, 759 (Utah 1984); Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985). The cases have done little more than list these factors. Id.

This Court, in Crookston, supra, spent its efforts to provide guidance to element (vii) regarding the comparison of the punitive damages to the amount of actual damages. While that comparison does not place a cap on the award of punitive damages it does provide substantial guidance as to the maximum amount that a jury could award when punitive damages are sought. It certainly sets a soft cap on the amount. The Utah Supreme Court without equivocation established some "concretely definable" parameters within which the jury could operate. Those parameters do not allow the award of punitive damages as compared to actual damages to exceed a ratio of 3 to 1, except in the most unusual and

egregious of cases. This analysis is made with the overlay that "punitives are allowed only where there is " 'wilful and malicious' conduct, ... or ... conduct which manifests a knowing and reckless indifference toward, and disregard of, the rights of others." Crookston at 807; Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1186 (Utah 1983) (citations omitted); see also Rugg v. Tolman, 39 Utah 295, 304, 117 P. 54, 57 (1911). Consequently, since punitive damages can only be awarded in circumstances where "wilful and malicious" conduct or "reckless indifference" to others occurs, if the award is to be enhanced beyond the ratios set for the determining the reasonableness of awards of punitive damages the conduct has to be significantly more egregious than "wilful and malicious" or "reckless indifference." Perhaps the placing of another life or physical safety in extreme jeopardy would be the most likely factor for enhancing the amount of punitive damages beyond the recognized ratios. Mere economic loss would not enhance the amount of punitive damages beyond ordinary standards.

2. Application of Punitive Damages to Actual Damages Ratios: Punitive damages that are excessive will not be upheld.

Since this Court focused its attention to an extensive discussion of the appropriate ratios of actual damages to punitive damages, we will do the same.

(a) Importance of Ratios: With Regard to the importance of the punitive damages being in reasonable relation to the actual damages the Court said:

> Among the seven factors we have repeatedly listed that should be considered in determining the amount of a punitive damage award is the "amount of actual damages." E.g., Bundy, 692 P.2d at 759. Although we have not articulated any standard for determining the importance to be assigned this

> factor, we have said that the amount of a punitive damage award generally must bear a "reasonable and rational" relationship to the actual damages. Id. The punitive damage awards we have characterized as violating this "reasonable and rational" relationship rule have been labeled "grossly disproportionate" to the actual damages awarded and have been said to be the result of passion or prejudice. These awards have been either reduced by this court directly or remanded to the trial court for further proceedings. See, e.g., Jensen v. Pioneer Dodge Center, Inc., 702 P.2d 98, 101 (Utah 1985).

Id. at 810.

(b) **Overriding Importance of a Proper Ratio:** With regard to the overriding importance of the ratio of actual damages to punitive damages the Court said.

> Although this is only one of the factors identified by this court to date to be considered in determining an appropriate amount of damages, it is one which is more concretely definable and which we today further refine to give better guidance. We leave for another day the possibility of further refining other factors we have previously identified, as well as the possibility that additional factors may be developed as we consider particular situations presented to us in the course of reviewing trial court rulings.

Id. fn. 25.

(c) **When Punitive Damages are Less than $100,000.00:** On the establishment of a proper ratio, the Court concluded in cases where the punitive damages are less than $100,000.00 the punitive damages should not exceed three times the actual damages. Where punitive damages exceed three times the actual damages (i.e. 4 to 1, 5 to 1, etc.) the award is presumptively excessive as being the product of bias and prejudice. The Court wrote:

> Although vague in its articulation, an examination of the results of our cases shows that in its operation, this "reasonable and rational" relationship principle has produced some fairly predictable results. Generally, we have found

punitive damage awards below $100,000 not to be excessive only when the punitives do not exceed actual damages by more than a ratio of approximately 3 to 1.[9] See, e.g., Von Hake v. Thomas, 705 P.2d 766 (Utah 1985); Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982); Elkington v. Foust, 618 P.2d 37 (Utah 1980); Powers v. Taylor, 14 Utah 2d 152, 379 P.2d 380 (1963); DeVas v. Noble, 13 Utah 2d 133, 369 P.2d 290 (1962); Evans v. Gaisford, 122 Utah 156, 247 P.2d 431 (1952).

(d) When Punitive Damages are Greater than $100,000.00: On the establishment of a proper ratio, this Court concluded in cases where the punitive damages are greater than $100,000.00 the punitive damages should be less than three times the actual damages, more like two times or even less. In that situation when the ratio is 3 to 1 or more disparate (i.e. 4 to 1, 5 to 1 etc.) the award is presumptively excessive as being the product of bias and prejudice. VanDyke v. Mountain Coin Machine Distributors, Inc., 758 P.2d 962, 965 (Utah App. 1988). The ratio should be more like 2 to 1 or 1 to 1 or perhaps even greater (i.e. ¾ to 1 or ½ to 1). The Court wrote:

> Because of the limited number of cases considering large awards, it is more difficult to note a particular pattern once the award exceeds approximately $100,000. However, it is safe to say that these large awards appear to receive more scrutiny than the smaller awards and that the acceptable ratio appears lower. See, e.g., Von Hake, 705 P.2d at 772 (Stewart, J., concurring and dissenting) (majority opinion upholding $500,000 punitives-1 to 1 ratio); Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1113 (Utah 1985) (Stewart, J., concurring and dissenting)(majority upholding $200,000 punitives-- ½ to 1 ratio). In one such case, when the ratio exceeded 2 to 1, we reduced the award on grounds of excessiveness. See First Security Bank, 653

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[9] In Footnote 26, the Court wrote: "A few cases have upheld punitives above a 3 to 1 ratio. See Ostertag v. La Mont, 9 Utah 2d 130, 339 P.2d 1022 (1959) (upholding punitives of $860 to actual damages of $140); see also Falkenburg v. Neff, 72 Utah 258, 270, 269 P. 1008, 1013 (1928) (reducing punitives to $1,500 where actuals were $362.50)." Crookston at 810.

P.2d at 598-99 (reducing $100,000 punitives –3 to 1 ratio--to $50,000--2 to 1 ratio).

Id. at 810.

While the number of Utah cases examining awards exceeding $100,000 is more limited it is safe to say that the larger the award the more scrutiny the court places on it and the acceptable ratios tend to be smaller. See Von Hake v. Thomas, 705 P.2d 766,772 (Utah 1985) (upholding $ 500,000 punitive damages: 1 to 1 ratio); Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1113 (Utah 1985)(upholding $ 200,000 punitive damages: 1/2 to 1 ratio). In First Security Bank the court reduced a ratio of more than 2 to 1 on the grounds of excessiveness. See First Security Bank v. J.B.J. Feedyards, 653 P.2d 591, 598-99 (Utah 1982) (reducing $100,000 punitive damages: 3 to 1 ratio, to $ 50,000: 2 to 1 ratio).

(e) **Out of Parameter Awards are not Upheld:** The Court then went on to state a general rule and indicate that punitive damages that do not fall within the perimeters that the court has set ***"have seldom been upheld."*** The Court wrote:

> The general rule to be drawn from our past cases appears to be that where the punitives are well below $100,000, punitive damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and that where the award is in excess of $100,000, we have indicated some inclination to overturn awards having ratios of less than 3 to 1.

Id. at 810.

(f) **Justification of Excessive Awards:** If the ratio is to be more disparate than 3 to 1 for the $100,000.00 or lesser award or even less disparate than that for the $100,000.00 or greater award, even though the case was tried to a jury, the court must justify

such an out-of-character award. The Court wrote:

> The judge's articulation should generally be couched in terms of one or more of the seven factors we earlier listed as proper considerations in determining the amount of punitive damages, unless some other factor seems compelling to the trial court. For example, a trial court might conclude that an award should stand, despite a ratio that is higher than we have generally approved, because the defendant displayed an extremely high degree of malice, e.g., actual intent to harm[10] or a high degree of likelihood of great harm based on the reprehensible nature of the act.[11]
>
> * * *
>
> In sum, the trial judge's articulation should explain why the award is not excessive despite the fact that it exceeds the general pattern of awards upheld in our prior cases.

Id. at 811-812.

It is interesting that the cases which this Court refers to for facts to support an award that is not within acceptable parameters point to the risk of physical harm or when economic gain is associated with personal injury. See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App.3d 757, 174 Cal. Rptr. 348, 388 (1981) (upholding punitive award of $3.5 million for "conscious and callous disregard of public safety in order to maximize corporate profits"); Ford Motor Co. v. Havlick, 351 So.2d 1050, 1050 (Fla.Ct.App.1977)(upholding award of

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[10] See, e.g., Cox v. Stolworthy, 496 P.2d 682, 690 (Idaho 1972) (exemplary damages in deceptive for-profit business scheme should make the cost of such repetitive antisocial conduct uneconomical), overruled in part, Cheney v. Palos Verdees Inv. Corp., 104 Idaho 897, 665 P.2d 661, 667 (1983). [Footnote the Court's.]

[11] See, e.g., Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 174 Cal.Rptr. 348, 388 (1981) (upholding punitive award of $3.5 million for "conscious and callous disregard of public safety in order to maximize corporate profits"); Ford Motor Co. v. Havlick, 351 So.2d 1050, 1050 (Fla.Ct.App.1977)(upholding award of $1,740,000 against Ford). [Footnote the Court's.]

$1,740,000 against Ford). It is interesting to note that even in these cases the awards of punitive damages ($3.5 million and $1.74 million) against Ford Motor Company, one of the country's largest business entities is roughly equal to the punitive damages awarded against the defendants in this case where there was no risk of physical harm and the defendants were small and not in any way in the economic class of Ford Motor Company. That in itself shows the bias and prejudice that was shown towards these defendants.

3. Evidence of Passion or Prejudice: Prejudice may be inferred from the amount of the judgment and no other evidence is necessary or required.

Diversified claims that the trial court erred by granting a new trial, or in the alternative, a remittitur because (a) there was no evidence that the jury acted on improper passion or prejudice; or (b) based solely on the ratio of punitive damages to compensatory damages. However, it is clear that the verdict was excessive and passion or prejudice will be assumed in such a case.

Following a jury verdict, and a motion for new trial, the trial judge may find that the verdict was a result of passion or prejudice because of its excessiveness. While generally the judge has no insight into the jury deliberations the judge must interpret the verdict and weigh it according to the facts and the law. In this case, the jury returned a verdict with an award where the punitive damages awarded by the jury were grossly disproportionate to the award of actual damages and way out of line to those awards that have been accepted by the Utah Supreme Court. Diversified argues that there was no evidence before the trial court that the verdict was a result of passion or prejudice. However, in First Security Bank v. J.B.J.

Feedyards, 653 P.2d 591, 599 (Utah 1982), the Utah Supreme Court stated that:

> [W]here it appears that such an award resulted from passion or prejudice rather than reason and justice, this Court must not permit it to stand. In the absence of evidence in the trial record evincing such passion or prejudice, ***such may be shown by the excessive amount of the punitive damages award itself.***

(emphasis added); see also Bundy v. Century Equip. Co., 692 P.2d 754, 758-759 (Utah 1984); Van Dyke v. Mountain Coin Machine Distr., Inc., 758 P.2d 962, 965 (Utah Ct. App. 1988).[12] Clearly the excessiveness of the verdict is prima facie evidence that there was passion or prejudice involved. It follows then, that if the ratio of punitive to actual damages is outside the generally accepted range, the court may assume that the award is excessive. This assumption is accompanied by the presumption that the award is due to passion or prejudice.

C. Application to This Case: Applying the foregoing factors to this case justifies and compels a further remittitur to a level that falls within acceptable ratios.

In this case, the original verdict awarded by the jury far exceeded the realm that the United States Supreme Court and this Utah Supreme Court have found acceptable. In fact

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12 In Crookston v. Fire Ins. Exch., 817 P.2d 789, 811 (Utah 1991), the Court stated:

> [W]e find that guidelines emerge for trial courts faced with challenges to punitive damage awards on the grounds of excessiveness under rule 59(a)(5). ***If the ratio of punitive to actual damages falls within the range that this court has consistently upheld, then the trial court may assume that the award is not excessive.***

(emphasis added). If the ration is outside the range then we can assume that it is excessive.

the punitive damages determined by the jury were nearly seventy times the actual damages and can be clearly presumed to be excessive and the result of passion and prejudice. The trial court remitted the punitive damages but still left the amount of punitive damages far in excess of acceptable amounts. The trial court remitted a ratio of $5,130,500.00 punitive damages to $71,336.00 actual damages (69.8 to 1) to a judgment of $1,052,757.00 in punitive damages to $71,336.00 actual damages (14.75 to 1). Even in its remitted amount the damages are excessive.[13] That ratio still exceeds the "rule of thumb" ratio and cannot be justified.

The trial court failed to adequately remit the amount of the judgment based upon two flawed premises. First, the trial court treated a joint a several judgment of $71,336.00 as if it was a separate judgment against each defendant. In doing so the trial court applied a ratio of punitive damages to actual damages for each defendant when there was in actuality only one $71,336.00 loss attributed to fraud. Punitive damages ought to have been aggregated to compare to the actual damage. Second, the trial court supported the punitive damage ratios by including the negligence damages, thereby reducing the multiple of punitive damages to actual damages. And, third, the trial court was unduly harsh given the facts of the matter.

1. In Determining Ratios the Punitive Damages Should Be Aggregated.

In determining the ratio the aggregation of the punitive damages awarded is the only rational method of creating a true picture of the comparison of the actual damages to the

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[13] The trial court by reducing the amount of punitive damages did the right thing but just did not do enough of the right thing.

punitive damages. The cases universally demand an examination of the ratio of compensatory to punitive damages. While four defendants were found to be liable for some form of fraud, they were determined to be joint and several judgment debtors for only the amount of $71,336.00. As such, the actual compensatory damage for the fraud was $71,336.00, *not four times $71,336.00.* Diversified would not be able to collect four times the actual damages for those actual damages. Therefore, it stands to reason that the amount of punitive damages awarded should not be justified by the whole amount of lass attributed to each defendant. If it were otherwise, there would be a premium on joining as many people as possible as defendants so that the punitive damages could be leveraged to higher and higher amounts. The trial court's remitted judgment awarding $1,052,757.00 in punitive damages, therefore, is an award that is wholly and unquestionably out of proportion to the actual loss that was sustained for the fraud committed as this Court has set guidelines for awarding such damages. The question that this Court is asked to decide is: How much in punitive damages can a loss of $71,336.00 support. The remitted amount of $1,052,757.00 is far beyond that amount. The amount should be more like two times[14] the amount of actual damage, or $142,672.00 (or perhaps even less) allocated amongst the defendants.

The fact that other civil or criminal penalties exist for claimed violations shed some light on how significant the wrongful conduct was. It is interesting that in this case the jury

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[14] See discussion on the punitive damages to actual damages ratio *supra*. When punitive damages are in excess of $100,000.00 the ratio should be less than three times and more like two times or less than the amount of actual damages.

was asked to determine what the civil penalties would be for the actions of the parties. Those determinations are as follows:

DEFENDANT	AMOUNT OF PENALTY
Knapp	$60,946.00
University	$-0-
Turner	$41,502.00
Haws	$4,200.00
TOTAL:	**$106,648.00**

The statute under which these penalties are rendered is Utah Code Ann. §61-2-11. That statute provides a long list of violations for which a "civil penalty in an amount not to exceed $500 per violation" may be imposed. Given those damages there would have had to be found at the very least 213 violations. Yet their clearly was no evidence of that many violations. The significance is, however, that the legislature has determined the value of the violations that the plaintiff's claimed to have been damaged by. That is not to exceed $500 per violation. That again is grossly out of proportion to the $1,052,757.00 in punitive damages and further demonstrates to excessive nature of the punitive damage findings made by the jury, even as remitted by the trial court.

2 Punitive Damages Should Not be Supported by Negligence Damages.

The trial court supported his determination of punitive damages to actual damages ratios by combining both fraud and negligence damages together thereby skewing the ratios improperly . Simple negligence will never suffice as a basis upon which punitive damages

may be awarded. "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Restatement (Second) of Torts § 908 comment b at 465 (1979). A defendant's conduct must be malicious or in reckless disregard for the rights of others, although actual intent to cause injury is not necessary. Branch v. Western Petroleum, Inc., 657 P.2d 267, 277-78 (Utah 1982). By using negligence damages to bolster a ratio of actual damages is a not to subtle way to award punitive damages for negligent conduct and is improper.

3. The Facts Do Not Warrant Greater Than "Standard" Punitive Damages.

To get punitive damages in the first place a party must have already acted with malice, spite or intent to injure. Therefore, the "standard" punitive damages will suffice under all but the most egregious circumstances. What follows here are some factors that place this matter directly in the "standard" category, thereby compelling the imposition of punitive damages if they are going to be assessed at all in that "standard" category and not as an exception to that category.

The harm inflicted was solely economic in nature. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996). There was no physical harm inflicted. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996). The harm inflicted was not in any way in reckless disregard of the health or safety of the plaintiffs. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996). Diversified received real property and improvements in value in excess of $600,000.00 (more likely in excess of

$700,000.00 given that was the price the property was actually sold by First Security Bank and the property had been appraised at a fair market value of $900,000.00 or more.). There was no evidence that the damage to the plaintiff exposed the plaintiffs to ruinous bankruptcy or other severe financial distress. See Crookston v. Fire Insurance Exchange, 860 P.2d 937, 940 (Utah 1993)(Crookston II).

There was no evidence that Diversified failed to have any benefit from the transaction or that there was no benefit to the transaction. See Crookston v. Fire Insurance Exchange, 860 P.2d 937, 940 (Utah 1993)(Crookston II). The fraud damages in relation to the value of the property was no more than 10% of the value of the property. There is no evidence that the plaintiffs' mental or financial health were devastated. See Crookston v. Fire Insurance Exchange, 860 P.2d 937, 940 (Utah 1993)(Crookston II); Terry v. Z.C.M.I., 605 P.2d 314, 328-29 (Utah 1979)(false arrest caused debilitating depression). [Parish testified that the harm which resulted from the impropriety was a dampening of his enthusiasm and a reduction of the return on the investment. (T.T. at 87)] Payment of the fraud damages and interest will make the plaintiffs whole financially.

There is no evidence that any of the defendants had previously engaged in the conduct that was found to be objectionable by the jury. (R.) See Crookston v. Fire Insurance Exchange, 860 P.2d 937, 940 (Utah 1993)(Crookston II). The conduct that was found to be objectionable by the jury was an isolated event. (R.) See Crookston v. Fire Insurance Exchange, 860 P.2d 937, 940 (Utah 1993)(Crookston II). There is no evidence that the conduct found to be objectionable by the jury was a part of a pattern of wrongdoing. See

Crookston v. Fire Insurance Exchange, 860 P.2d 937, 941 (Utah 1993)(Crookston II). The transaction was a purely business transaction between sophisticated and experienced business people.

The transaction was sufficiency favorable so that Diversified desired to retain the benefits of the transaction and not rescind the transaction. The property ultimately sold at an increased value over which it was purchased. Diversified completed the transaction even thought they had some reservations about the conduct of the defendants at the time of closing. Given the choice to rescind or affirm the contract diversified sought to affirm the contract.

Richard Knapp was relatively youthful at the time of the conduct, being only 26 years old.(R. at 2084). There was no evidence that Richard Knapp had done the conduct that he was accused of doing prior to this incident or after the incident.(R). Richard Knapp was not an active real estate agent and in fact had done only one (1) real estate transaction as an agent prior to that time and none after that time.(T.T. at 331). Richard Knapp had a less active role and passive role in the transaction than did Gilbert Turner.(R. at 2092). Parish testified that Knapp never made a misrepresentation regarding the transaction.(T.T. at 167). Richard Knapp surrendered his real estate licence to the licencing agency and has not received or applied for a reinstatement of his licence. Therefore, Richard Knapp cannot be in a position to perpetrate the same conduct in the future. Richard Knapp was terminated by Haws over the conduct that resulted in the punitive damage award. (T.T. at 249).

Richard Knapp sought to rescind the transaction when there was concern that the

plaintiffs were dissatisfied with the transaction.(T.T. at 11). Richard Knapp is not a interstate chain of businesses where the transaction sought to be sanctioned is a common or reoccurring event. See Hall v. Wall-Mart Stores, Inc., 959 P. 2d 109, 112 (Utah 1998).

With regard to defendant University specifically, University participated in the wrongful conduct only through Richard Knapp.(R. at 2079). University sole participation was to own the property prior to the sale to the Diversified.(Id.) There was no evidence of University's wealth. (Id.)

With regard to defendant Haws Companies specifically, Haws Companies terminated Richard Knapp over the conduct that resulted in the punitive damage award.(T.T. at 249). Haws Companies terminated Gilbert Turner before this conduct that resulted in the punitive damage award became known to Haws Companies when other unrelated improprieties that were unrelated to Haws Companies came to light.(T.T. at 202). The jury verdict against Haws for punitive damages is roughly 25% of its net worth.(R. at 2076). Haws Companies never received any remuneration for the sale transaction between Diversified and University.

With regard to defendant Gilbert Turner specifically, Gilbert Turner surrendered his real estate licence to the licencing agency and has not received or applied for a reinstatement of his licence.(R. at 2090). Therefore, Gilbert Turner cannot be in a position to perpetrate the same conduct in the future.(Id.) No evidence of Gilbert Turner's wealth was submitted to the jury.(R. at 2093). See Hall v. Wall-Mart Stores, Inc., 959 P. 2d 109, 112 (Utah 1998)("[A] plaintiff who fails to introduce evidence of the defendant's wealth risks having an award struck down on the basis of excessiveness."

Based upon the foregoing, the punitive damage award, if any award is granted, ought to be remitted to an amount that falls well within the guidelines established by this Court for the award of punitive damages. That should be no more than two times the actual damages, and actual damages should use only those damages that can support a punitive award in the first place — the fraud damages and not the negligence damages.

POINT 3: IF PUNITIVE DAMAGES ARE APPROPRIATE IN THIS MATTER, THE AWARD AGAINST KNAPP *AND HIS EMPLOYER*, UNIVERSITY PROPERTIES, INC., FOR THE ACTIONS OF KNAPP CONSTITUTE A DOUBLE RECOVERY AND ARE EXCESSIVE.

As has been discussed previously in this matter, the award of punitive damages under the circumstances of this case is improper, as a matter of law. Punitive damages are not to be awarded in a fraud action where the person defrauded chooses not to rescind the contract but rather to enforce the contract. Nevertheless, if punitive damages are capable of being awarded in this matter, an entity and its agent should not be liable for separate awards of punitive damages for actions of the agent. In this matter, the remitted judgment allocated punitive damages to Knapp in the amount of $500,000.00 and to his employer and wholly owned corporation, University, in the amount of $214,000.00. University's role in the transaction was acted out exclusively by Knapp.

If a Judgment is to be rendered against Knapp and University it should be in the amount rendered against Knapp not in separate amounts against each.

In this matter the jury returned a verdict awarding punitive damages against Knapp and University for the actions of Knapp. The evidence at trial established that Knapp was

president of University Properties and that he was the 90% owner of University. (R. at 2079) "[T]here was no testimony or evidence of any corporate act of University Properties taken by any other person other than Mr. Knapp." (Id. Quoting Judge Taylor in his Memorandum Ruling whereby a remittitur was granted.) University was completely dominated and controlled by Knapp. (Id.) In fact, the conduct of Knapp could not be separated from the actions of University. (Id.) No additional evidence beyond such mere ratification has been established.

The general rule is, absent unusual circumstances, the principle is not liable for the intentional torts of its agent, and especially not liable for punitive damages for the actions of its agents. While in this case the principle may be liable for the acts of its agent, that liability is still derivative. "[L]iability, if any, of a principal or master to a third person is purely derivative and dependant entirely upon the principle of respondeat superior," and the ***"plaintiff can have but one satisfaction*** – payment of the damages caused by the wrongful act of [the servant]". McLain v. Taco Bell Corp., 2000 WL 343629 *9 (N.C. App.)(emphasis added). While the plaintiff may sue the servant and/or the master/principle, "***the recovery against the principal . . . may not exceed the amount of the recovery against the . . . servant.***" McLain v. Taco Bell Corp., 2000 WL 343629, *9 (N.C. App.)(citing Watson v. Dixon, 511 S.E.2d 37, 40-41 (N.C. Ct. App. 1999))(emphasis added); see also Nelson v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints, 935 P.2d 512, 513 (Utah 1997)("although the employer and employee are not [common law] tortfeasors, ***they are*** nonetheless ***each obligated for the same thing***– total reparation of the

damages to the victim")(emphasis added). A finding by a jury that an employer was only "negligent in hiring, supervising and retaining the employee [ratification] would not warrant an award of punitive damages." CP & B Enterprises, Inc. v. Mellert, 2000 WL 236349 * 6 (Ala.).

Diversified is entitled to ***only one*** recovery from Knapp and University Properties as a matter of law. Even if punitive damages are proper as against University Properties, the general "one recovery" rule stated above applies with equal force to awards of punitive damages. Punitive damages against an employer in an amount greater than against employee are only proper where the employer's liability appears "based upon more than mere ratification." Watson v. Dixon, 511 S.E.2d 37, 40-41 (N.C. Ct. App. 1999). In this case, nothing more than "mere ratification" has been established.

Accordingly, Diversified is entitled to only one recovery from Knapp (the employee) and University Properties (the employer). Further, the evidence established at trial as set forth by Diversified shows no actions by University Properties beyond mere ratification, and accordingly punitive damages may not be awarded against University Properties, and, if punitive damages are awarded against University Properties, the one recovery rule applies in full force.

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POINT 4: THE JURY WAS NOT ALLOWED TO SEE RELEVANT AND MATERIAL EVIDENCE THAT COULD HAVE HAD AN IMPACT ON THE AMOUNT OF DAMAGES, IF ANY, THAT WOULD BE AWARDED, INCLUDING THE AMOUNT OF PUNITIVE DAMAGES.

Under Utah law, certain factors[15] are to be considered in assessing the amount of punitive damages to be awarded. See Crookston v. Fire Insurance Exchange, 817 P. 2d 789, 808 (Utah 1991); Bundy v. Century Equip. Co., 692 P.2d 754, 759 (Utah 1984); Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985). The jury is to consider the effect of the conduct on the "lives of the plaintiff and others" as a factor in the award of punitive damages. Punitive damages "should not be unreasonably disproportionate . . . to the nature of the wrong done and the injury caused," Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1975), in that an award of punitive damages should "bear some relation to the injury . . .." Falkenberg v. Neff, 269 P. 1008, 1013 (Utah 1928). One of the effects on the lives of Diversified was what the transaction brought to Diversified. In Diversified contended that it was induced to enter a transaction that ultimately paid it very handsomely. Yet the jury was never allowed to see that. As such, the jury was left with a very incomplete picture of what the effect of the

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[15] Those factors include the following seven:
(i) the relative wealth of the defendant
(ii) the nature of the alleged misconduct
(iii) the facts and circumstances surrounding such conduct
(iv) the effect thereof on the lives of the plaintiff and others
(v) the probability of future recurrence of the misconduct
(vi) the relationship of the parties
(vii) the amount of actual damages awarded.
See Crookston v. Fire Insurance Exchange, 817 P. 2d 789, 808 (Utah 1991); Bundy v. Century Equip. Co., 692 P.2d 754, 759 (Utah 1984); Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985).

transaction had on Diversified.

One of the best ways to determine the effect on Diversified is to determine the ultimate return Diversified made on its investment. In this case Diversified made $415,000.00 in just under four years on a $785,000.00 investment when the property was sold for $1,200,000.00. That is a hefty 13.2% return on its investment. There is no question that Diversified made significant profit off the deal. Diversified never wanted to rescind the deal, even though defendant Knapp offered to completely undo the transaction. Diversified liked the bargain it got. ***Diversified specific decision to affirm the transaction is evidence in and of itself that it knew it was a good deal.*** In the present case, it is undisputed that Diversified decided to affirm the Ernest Money Agreement and retain the benefits of the contract, e.g., the purchase of the Office Building.[16]

The trial court, however, denied the jury the ability to assess the consequence of the transaction when it denied the jury the ability to see the ultimate financial impact on Diversified for the actions. Furthermore, the fact that Diversified choose to not rescind the transaction is probative of the value that Diversified placed on the transaction. In that regard the market place has spoken volumes as to the quality of the transaction into which Diversified entered. The impact could not have been so great on Diversified when, having the opportunity to rescind the transaction from the earliest days, Diversified choose to stay

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[16] By retaining the benefit of the bargain under the Ernest Money Agreement, Diversified effectively and irrevocably waived any claim of fraud in the inducement. See Memorandum of Points and Authorities in Support of Motion for Judgment Notwithstanding the Verdict or in the Alternative for new Trial.

to reap the benefits.

The jury should have been allowed to have seen the evidence of the sale of the Office Building and the rejection of the offer to rescind in order to more fully assess the impact on Diversity. A reasonable juror could conclude that the negative impact on Diversified was in fact minimal, if any.

POINT 5: UTAH CODE ANN. §78-22-1 PROVIDES FOR THE RELEASE OF A JUDGMENT LIEN WHEN THE JUDGMENT IS SECURED.

Supersedeas bonds were issued in this matter for the undertaking of the appeal. Those bonds fully secured the payment of the judgment. Once secured, the Knapp defendants requested that the court release the judgment lien so that Knapp could continue to undertake his business. The trial court granted that request over the objections of Diversified. Diversified appealed that decision to this Court. A motion was heard on the law and motion calendar of this court whereby Diversified asked this court to stay the release of that judgment lien. That motion was denied and the issue of whether a supersedeas bond can be sufficient security to release a lien was referred for further briefing.

A. Controlling Authority:

The applicable and controlling authority is Utah Code Ann. §78-22-1(5), which provides as follows:

> (5) (a) If any judgment is appealed, upon deposit with the court where the notice of appeal is filed of cash **or other security in a form and amount considered sufficient by the court that rendered the judgment** to secure the full amount of the judgment, together with ongoing interest and any other anticipated damages or costs, including attorney's fees and costs on appeal, the lien created by Subsection (2) shall be terminated as provided in Subsection

(5)(b).

> (b) Upon the deposit of sufficient security as provided in Subsection (5)(a), the court **shall enter** an order terminating the lien created by the judgment under Subsection (2) and granting the judgment creditor a perfected lien in the deposited security as of the date of the original judgment.

(Emphasis added).

The Court requested that the legislative history of this section of the code be included in the briefing.

In the 1999 General Session of the Utah State Legislature, Senator John Valentine sponsored Senate Bill 142, entitled, "An Act Relating to the Judicial Code; Providing for the termination of judgement liens which are appealed upon the filing of adequate security; and making technical changes." The Bill was amended from the originally submitted Bill which evolved into the subsection 5 which was added to the existing statute.

The legislative history surrounding Senate Bill 142 is minimal. In fact, the legislation was largely unopposed and the Utah State Office of Legislative Research and General Counsel commented briefly on the bill stating that "[a] limited review of this legislation raises no obvious constitutional or statutory concerns." Legislative Review Note 1-28-99 10:23 AM. Copies of the original Senate Bill with hand written revisions, the final version and the Legislative Review Note are attached as Appendix F for the Court's convenience.

B. The phrase "other security" in Utah Code Ann. §78-22-1(5)(a)-(b) includes the use of a supersedeas bond to secure a judgment if the trial court finds it to be "in a form and amount considered sufficient."

Diversified asks this Court to conclude that since the phrase "supersedeas bond" does not

appear in the statute that a supersedeas bond cannot be used to secure a judgment so that the judgment lien can be released. That would be a misplaced interpretation of that statute. The statute provides that what may be used to secure a judgment is "cash or other security." "[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd." Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980), see also State v. Martinez 896 P.2d 38, 40 (UT App. 1995).

Furthermore, "not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed" the meaning can be determined. People of Puerto Rico v. Shell Co., 58 S.Ct. 167, 169, 82 L.Ed. 235; cited by Chez ex rel. Weber College v. Utah State Bldg. Commission, 74 P.2d 687, 690 (Utah 1937).

The purpose of the statute in question was to find acceptable ways to relieve a judgment debtor of the lien upon his property during appeal when the underlying judgment is adequately secured. Adequate security could be cash or "other security." What the Utah Legislature did was leave to the courts the ability to determine what that "other security" could be. Conceivably the "other security" could be any number of different items of security[17] that would have to be examined on a case-by-case basis to determine if it is

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17 It does not take much imagination to come up with an extensive list of what could be "other security." Real property, personal property, contract rights and other intangibles could all be used to secure the judgment. It is left to the trial court to determine whether the security, in whatever form, is sufficient.

"sufficient." The responsibility to determine what the "other security" may be and whether it is sufficient rests with the trial court. Given that the phrase "other security" should have some meaning and that the purpose of the statute is to relieve a judgment debtor of a judgment lien when the judgment creditor is protected, it is more than reasonable to conclude that a supersedeas bond can be such "other security."

Diversified wants to suggest that the legislature had to include a supersedeas bond by name in "other security." Quite the opposite is true. If the legislature had intended that a supersedeas bond *could not be* that "other security" it should have said so. Since the legislature did not so exclude a supersedeas bond as such security and supersedeas bonds do in fact secure judgments, a supersedeas bond is one of many types of security that can be relied upon to secure a judgment in order to allow the termination of the judgment lien.

In this case, the trial court concluded that supersedeas bonds in an amount equal to or greater than the amount of the judgment against the Knapp defendants plus anticipated interest which bonds are payable upon the resolution of the appeal in this matter were sufficient security. There was no evidence presented to the trial court that the bonding company, Travelers Casualty and Surety Company of America, was not solvent and capable to meet the obligations of its bonds. Diversified has raised no issue, either in briefing or in oral presentation before this Court[18] or the trial court, as to the current capacity of the surety

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The related issue of whether the Order Terminating Judgment Lien should be stayed was argued to the Court on its Law and Motion calender on January 16, 2001. At that time Diversified made no claim that Travelers is not capable to meet its obligations under the bonds, but asserted that Travelers might be incapable or unwilling in the future to meet its

to perform its duties under the bonds.

C. There is no Utah authority that would preclude the trial court using a supersedeas bond to secure a judgment and terminate a judgment lien.

Diversified has cited below two Utah cases to the effect that the "sole purpose" of a supersedeas bond is to stay enforcement. Those cases, Skeen v. Pratt, 87 Utah 121, 48 P. 2d 457, 458 (Utah 1935), and U-M Investments v. Ray, 701 P. 2d 1061, 1063 (Utah 1985), on review, are not on point in any manner. Skeen stands for the proposition that an appealed but unbonded judgment can be nonetheless executed upon. U-M Investments stands for the proposition that a supersedeas bond secures the entire judgment and not just the costs on appeal. Neither case addressed a situation where a sufficient supersedeas bond was issued and the request was made to terminate a judgment lien.

Those cases did not in any way determine or even remotely touch upon whether a sufficient supersedeas bond is also sufficient to require the termination of the judgment lien. Furthermore, and perhaps most importantly, both of those cases predate the Utah statute that controls this issue. The relevant provisions of Utah Code Ann. §78-22-1(5), were adopted by the Utah Legislature in 1999, long after the cases referred to by Diversified were concluded. Therefore, even if the conclusion of those cases were that the sole purpose of a supersedeas bond is to preclude execution that conclusion would now have to be modified in light of the legislative pronouncements in Utah Code Ann. §78-22-1(5). If the cases cited

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obligations that it has bound itself to before the Fourth District Court. Thus, Diversified's claims rest fully on factually unsupported speculation.

by Diversified were applicable they would have undoubtedly been countermanded by the legislature in enacting the modifying provisions of Utah Code Ann. §78-22-1(5). See generally, In the interest of E.H.H., 2000 UT App 368, ¶16, 16 P. 3d 1257.

It is simply a stretch beyond recognition to say that the opinions cited by Diversified are a "clear" indication of what this Court should determine in this matter today, as Diversified suggests. Those cases do not purport to even address the issue before this Court nor do they take into account all that the legislature has recently said on the subject.

The release of the judgment liens on property held by the Knapp defendants so that the judgment debtors (the Knapp defendants) can continue with their respective businesses, while the judgment creditor, Diversified, remains fully secured, should be sustained. The entry of a sufficient supersedeas bond in this matter, as has already been determined by the trial court, makes the judgment lien redundant and an improper restriction on the Knapp defendants. Therefore, the trial court's determination to "enter an order terminating the lien created by the judgment" should be upheld.

CONCLUSION

Based upon the foregoing analysis and authority, this Court should further modify the judgment in this matter to reflect the law. Consequently, the finding of fraud damages and the derivative punitive damages ought to be reversed inasmuch as Diversified affirmed the contract containing an integration clause. If the Court does not reverse the finding of fraud damages then this Court, at the least, should further remit the punitive damage award so that those damages do not exceed two times the fraud damages only ($142,672.00) and allocate

that amount amongst the defendants (or remand to the trial court to undertake the allocation) in the same proportion that the trial court below allocated punitive damages. Further, University and Knapp damages ought to be merged so that there is only one recovery for punitive damages between those two in the amount that the punitives damages are awarded to Richard Knapp. Attached as Appendix G are the possible solutions for this court to consider.

RESPECTFULLY SUBMITTED this 16th day of May 2001.

HOLMAN & WALKER, LC

By: _____
D. Miles Holman

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CERTIFICATE OF SERVICE

I hereby certify that this 16th day of May 2001 I mailed, postage prepaid, the foregoing **BRIEF OF APPELLANTS** to the following:

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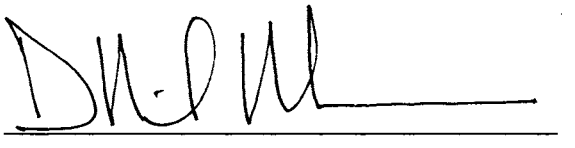

Appendix A

APPENDIX A

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

DIVERSIFIED HOLDINGS CO., L.C., Plaintiff, v. GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah corporation, THE HAWS COMPANIES, a Utah corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR. and JOHN DOES 1 through 4, Defendants.	JUDGMENT (Modified) Civil No. 930400136 Hon. James R. Taylor Division V

This matter having come on for trial before a jury and after hearing evidence, submissions of the parties and argument, the jury rendering its verdict on February 28, 2000, and this Court having received post-trial motions including a motion for remittitur or in the alternative for new trial, which motion was granted by this Court pursuant to the Memorandum Decision of this Court dated June 8, 2000 (signed June 12, 2000), the Court enters judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all previously entered judgments in this matter are hereby vacated and stricken.

Judgment is hereby entered in favor of Plaintiff Diversified Holdings, Co., L.C. and against Defendants Gilbert R. Turner, Richard M. Knapp, University Properties, Inc., and The Haws Companies, dba The Haws Companies Real Estate Services, jointly and severally, for fraud, in the amount of $71,336.00, plus interest on the principal amount at the prejudgment rate of 10% per annum from June 24, 1992 to the date of judgment thereafter at the judgment rate of 7.670% until paid in full.

Judgment is hereby entered in favor of Plaintiff Diversified Holdings, Co., L.C. for negligence (not jointly and severally) as follows:

1. Against Defendant Gilbert R. Turner in the amount of $26,000.00, plus interest on the principal amount at the prejudgment rate of 10% per annum from June 24, 1992 to the date of judgment thereafter at the judgment rate of 7.670% until paid in full,
2. Against Defendant Richard M. Knapp in the amount of $22,750.00, plus interest on the principal amount at the prejudgment rate of 10% per annum from June 24, 1992 to the date of judgment thereafter at the judgment rate of 7.670% until paid in full,

3. Against Defendant The Haws Companies dba The Haws Companies Real Estate Services in the amount of $16,250.00, plus interest on the principal amount at the prejudgment rate of 10% per annum from June 24, 1992 to the date of judgment thereafter at the judgment rate of 7.670% until paid in full.

Judgment is entered in favor of Plaintiff Diversified Holdings, Co., L.C. for punitive and exemplary damages (not jointly and severally) as follows:

1. Against Defendant Gilbert R. Turner in the amount of $208,257.00,
2. Against Defendant Richard M. Knapp in the amount of $500,000.00,
3. Against Defendant University Properties, Inc. in the amount of $214,000.00,
4. Against Defendant The Haws Companies dba The Haws Companies Real Estate Services in the amount of $130,500.00,

plus interest on the principal amount at the judgment rate of 7.670% from and after the date of judgment until paid in full.

Pursuant to Utah Code Annotated § 78-18-1(3) the Court directs that 50% of the amount of punitive damages collected from Defendants in excess of $20,000, after payment of attorney's fees and costs, be remitted to the State Treasurer for deposit into the general fund.

Plaintiff is awarded its costs in the amount of $_____.

DATED this 25 day of July, 2000.

BY THE COURT:

HON. JAMES R. TAYLOR
Fourth District Judge

Approved as to Form:

HOLMAN WALKER & HUTCHINGS

JEFFREY N. WALKER
Attorney for Defendants

MAILING CERTIFICATE

This is to certify that a copy of the foregoing JUDGMENT (Modified) was mailed, postage prepaid, this 19th day of July, 2000 to the following:

Jeffrey N. Walker
HOLMAN WALKER & HUTCHINGS
9527 South 700 East
Salt Lake City, Utah 84070

F. Richards Smith III
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84603

Gilbert R. Turner
4066 Worthington Drive
Park City, Utah 84060

judgment.mod

Appendix B

APPENDIX B

SUPPLEMENTARY STATEMENT OF FACTS

(Supplementing the Concise Statement of Facts Included in the Body of the Docketing Statement)

(a) Sometime after April 15, 1992, Wes Parrish ("Parrish") of plaintiff Diversified Holdings was approached by Gilbert Turner ("Turner") regarding the Temple View Terrace building. Turner asked Parrish if he was interested in renting space in the building, to which Parrish replied that he was not, but might be in a year. Turner then asked Parrish if he might be interested in purchasing the building, and Parrish said that he might be. (Trial Transcipt ("T.T") at 49-51).

(b) Turner represented himself to Parrish as a real estate agent affiliated with The Haws Companies. Parrish was the president and CEO of Parrish Chemical Company. Parrish is a scientist with a Ph.D. in organic chemistry and post doctoral work in mechanical chemistry. He had been a principal in six companies in addition to Parrish Chemical. (T.T. at 49).

(c) Both Turner and Richard Knapp were licensed real estate agents affiliated with The Haws Companies. Turner became affiliated with The Haws Companies first. (T.T. at 283). Haws did not do a background check on Turner but agreed to the affiliation based upon a recommendation from a prominent and trusted developer and upon the previous experience of Richard Haws ("Haws"), who acted as principal broker for a company in which Turner was affiliated as an associate broker. (T.T. at 283). Knapp later became affiliated with Haws

Companies based upon Turner's recommendation and based upon Knapp's experience in doing his own real estate transactions and his presence in Utah County.

(d) Robert West, who was the principal broker of The Haws Companies, had various discussions with Knapp about opening a branch office of The Haws Companies in Utah County. Both Knapp and Turner were assigned cubicles at The Haws Companies in Salt Lake City, but rarely, if ever, used them. Haws had weekly meetings with the agents and brokers, but Turner and Knapp only attended a few of those meetings. Turner conducted some business out of The Haws Companies' office in Salt Lake City, and sometimes used a telephone and conference room at University Properties' ("University") office in Utah County. (T.T. at 452). During Knapp's affiliation with The Haws Companies, he transacted no business as an agent for The Haws Companies, except for the purchase by University Properties of the Temple View Terrace Building. Knapp is the President and majority shareholder of University Properties. (T.T. at 287).

(e) A formal agreement for a branch office of The Haws Companies in Utah County was never reached, and although Turner was licensed as a real estate broker, he was never designated as a branch broker for The Haws Companies. Robert West had regular telephone contact with Turner and Knapp and met with them occasionally in Utah County, but was not present in Utah County on a daily basis to supervise the activities of Turner and Knapp in Utah County. (T.T. at 284).

(f) In discussing a potential purchase of the Temple View Terrace building,

Parrish told Turner that he might need a partner. Turner said that he had a friend who might be interested, referring to Knapp. Parrish later met Knapp but ultimately both Knapp and Parrish decided not to partner in the purchase. Parrish was acquainted with Don Wooley, and the two had previously had discussions about doing some sort of real estate deal together. (T.T. at 54). Wooley was also an accomplished scientist, and Parrish trusted both his scientific and business abilities. Wooley has a Ph.D. in fuels engineering and chemistry. Wooley developed the Flair pen for the Papermate Pen Company, among other accomplishments, and also had experience in real estate, having previously bought and sold properties which he held for rent. Woolley had made good money as a scientist, but really made his money in real estate. Parrish and Woolley eventually determined to pursue purchase of the building together. (T.T. at 54).

(g) Parrish's first meeting with Knapp was within a few days of Turner's visit to Parrish. Knapp told Parrish that he (Knapp) was a law student who did real estate on the side. Knapp stated that at that time he was putting together a large real estate transaction. Knapp did not disclose that he was a real estate agent. Parrish asked Knapp if Knapp was a real estate salesman, and Knapp responded that he was not, but was taking a course and planned on becoming an agent in the future. (T.T. at 56). [Knapp's testimony was that while he did not disclose he was a licensed real estate agent, he never claimed not to be.] (T.T. at 339).

(h) At some point in time, Parrish and his wife formed plaintiff Diversified

Holdings Company and later added Mr. and Mrs. Wooley as members of that limited liability company. They began a process of negotiating the purchase of the Temple View Terrace building. During the process of negotiation and up to the time of the purchase, there was no disclosure that Knapp was a licensed real estate agent, that he was affiliated with The Haws Companies, that there was any sort of partnership relationship between Turner and Knapp, or that Turner stood to make any sort of a profit on the Temple View Terrace transaction other than commission as an agent. (T.T. at 57-60).

(i) During the negotiation process, Turner informed Parrish that they were approaching a deadline where the property was going to go to auction, and that he needed $5,000.00 to prevent the auction. The day before the deadline, Turner informed Parrish that Knapp had put up the $5,000.00 and purchased an option on the building. (T.T. at 58).

(j) In fact, Knapp did not purchase an option on the building, but University made an offer with an earnest money payment of $5,000.00 to First Security Bank to purchase the building for $650,000.00. A counter-offer was made, and University and the Bank entered into a contract for University to purchase the building for $700,000.00. Turner completed the earnest money sales agreement in this transaction. (T.T. at 59).

(k) There were various negotiations between Turner and Parrish, acting for plaintiff, on the purchase price of the building, which were not made very clear at trial. Parrish testified that originally Turner presented him with an earnest money agreement which disclosed a purchase price of $900,000.00, which was rejected. Parrish did not negotiate

directly with Knapp. Parrish informed Turner that Diversified was willing to let Knapp make a $10,000.00 profit on the deal and eventually arrived at a purchase price of $785,000.00. Parrish met Turner at the University office to sign the earnest money agreement. Knapp was not present, but was in the State of Florida at the time. Parrish asked Turner what Knapp's option price was, and Turner said he did not know. Turner placed a telephone call, purportedly to Knapp. (T.T. at 61). No call was in fact made to Knapp since Knapp was in Florida and not available to Turner by telephone. Knapp would call Turner but did not receive calls from Turner. Parrish heard Turner's side of the conversation, but could not verify who, if anyone, was on the other side of the telephone. (T.T. at 62). After the conversation, Turner told Parrish that Knapp's option price was $770,000.00. Although the earnest money agreement did not contain any contingency relating to University's profit but provided only a purchase price of $785,000.00, in Parrish's mind that figure represented Knapp's option price of $770,000.00, plus a $10,000.00 profit, plus the $5,000.00 which Knapp had put up for the option. (T.T. at 62-63).

(l) Parrish knew that the property was distressed, and he was looking for a bargain. He expected the purchase price of the building to be quite a bit lower, and he believed the value of the property to be lower than the $785,000.00 price, but Parrish testified that Turner was a good salesman and talked him and Wooley into the purchase. Diversified had expected First Security Bank to provide a copy of an appraisal on the building which the Bank had. (T.T. at 66). That appraisal valued the property at $980,000.00. The Bank did not

provide that appraisal, and so a new appraisal was obtained for Diversified's financing. That appraisal valued the property at $900,000.00. (T.T. at 585).

(m) Parrish asked Turner to represent Diversified, although a contract of representation was never entered into. Parrish believed that Turner was representing Diversified, but knew that prior to the closing Turner said he would not be comfortable representing Diversified. (T.T. at 64).

(n) Prior to closing on the transaction, Turner informed Parrish that there had to be a $70,000.00 payment made as earnest money to buy the property from First Security Bank. Parrish provided a cashier's check for $70,000.00 made payable to First Security Bank. Plaintiff's earnest money agreement provided that it was purchasing the property from University Properties, Inc. Plaintiff did not know that the earnest money agreement between University Properties and First Security Bank required a payment of $70,000.00, and it did not know that its $70,000.00 payment was being made in fulfillment of that contractual obligation. (T.T. at 67).

(o) At some point in the negotiation process, Parrish asked Turner why Knapp had paid $770,000.00 for the building when Parrish had previously been told that the purchase price would be $700,000.00. Turner replied that another party came in with an offer of $750,000.00, and so Knapp had to beat that price. Parrish asked why Knapp did not just offer $755,000.00, and Turner replied that the bank liked the other party's offer more than Knapp's and that it was prepared to take the other party's offer unless Knapp offered

substantially more. (T.T. at 70-71).

(p) As the closing approached, Wooley was short $50,000.00 for the purchase of the building. He had arranged to borrow the $50,000.00 from a lender at 18% interest per annum. Turner informed the plaintiff that he could get the $50,000.00 for Wooley at a better rate, and Parrish told Turner that they would do that if they could get a 10% rate. Turner said that Knapp would loan the $50,000.00 at 10%. Just before closing, Parrish called Knapp, who told Parrish the money would be there on a thirty (30) day note at 10%. Although neither Knapp nor Turner had stated 10% "per annum," Parrish understood that the 10% figure represented an annual percentage rate. (T.T. at 72). Knapp understood it to be a 10% flat rate. (T.T. at 343). When Parrish arrived at the closing, Wooley was late and Parrish examined the documents and saw that the $50,000.00 loan document contained a flat fee provision of $5,000.00 (a loan fee of 10% of the principal amount) rather than a 10% interest rate. Parrish was uncertain what to do, but ultimately decided to go ahead and close the transaction, then go back after the 18% interest rate. When it came time for Diversified to pay off the loan, it protested to Knapp about the $5,000.00 fee and insisted it would only pay a per diem interest rate based upon a figure of 10% per month (as opposed to per annum), which Knapp agreed to accept, and Diversified paid the sum of $1,336.00 in interest on the $50,000.00 loan. (T.T. at 73-74).

(q) Prior to closing the transaction, Knapp learned that Turner had misrepresented to Parrish the amount of profit which University Properties was to make on the transaction.

Upon learning this, Knapp told Turner he was not involved, and that Turner had better hope Diversified did not find out about the misrepresentation. Knapp did not disclose the misrepresentation to Diversified or to anyone else. (T.T. at 348-49).

(r) At the closing, Parrish began to feel uneasy and to suspect that something was "not right." The terms of the $50,000.00 note, combined with the demeanor of the people in the room, caused his suspicions. He learned that there were two closings, one for Diversified's purchase and one for University's purchase, and he asked to be present at the University closing with First Security Bank, but his request was denied. The people he asked questions of were evasive and this made him feel uneasy. He decided to go ahead with the closing and later investigate his suspicions. Parrish testified that he went ahead with the closing because he believed he would lose the $70,000.00 which was already paid, even though the earnest money agreement Diversified had entered into did not provide that the $70,000.00 was non-refundable. (T.T. at 79-80).

(s) The Ernest Money Agreement between University and Diversified contains the following language:

Paragraph L:

COMPLETE AGREEMENT – NO ORAL AGREEMENTS. ***This instrument constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral***

agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual agreement of the parties.

(Emphasis added). There was no testimony or evidence of any corporate act of University taken by any person other than Knapp, who was an employee of University and its 99% shareholder.

(t) Knapp earned a commission on the University purchase, but not on the Diversified purchase. Turner and University (acting through Knapp) agreed that Turner and University would evenly split the profit made on the sale to Diversified (T.T. at 304), which was contrary to the rules governing licensed real estate professionals. (T.T. at 431) Turner was also paid a broker's commission by Wasatch Bank on the loan which it made to Diversified for the purchase. (T.T. at 323-34) This was also contrary to the real estate licensure rules. (T.T. at 430-31).

(u) After the closing of the transaction, Wooley and Parrish went to The Haws Companies' office in Salt Lake City to ask questions and complain about the transaction. (T.T. at 85). Haws knew about the University\First Security Bank deal, but did not know the University\Diversified transaction was contemplated until after it was closed. No one at The Haws Companies knew the University\Diversified transaction had closed, but believing it to be a real estate sale effected by one of its agents, asked where its commission was. Haws Companies communicated by letter to Turner and Knapp demanding documentation and requesting Haws Companies' portion of the commission, which was never paid. Haws did

not take any other action to try and satisfy plaintiff. (T.T. at 245-47).

(v) Prior to the closing of the transaction between University and Diversified, Haws Companies discovered, by opening mail received at its office and addressed to Turner, that Turner was under investigation by the State Real Estate Division for failing to return earnest money which he had received from a client at a time when Turner was not affiliated with The Haws Companies. At some point, without the knowledge of The Haws Companies, Knapp loaned Turner $5,000.00 so that Turner could make restitution of the earnest money he had failed to return. Turner lost his license as a real estate broker as a result of the state investigation, but retained a license as a real estate agent. (T.T. at 314).

(w) Almost immediately upon learning of the pending disciplinary action, Haws Companies terminated Turner's affiliation with Haws effective June 1, 1992, which was approximately 25 days prior to the closing of this transaction, although Turner did not submit a change card to the Division of Real Estate indicating the termination of his affiliation with Haws and his new affiliation with a different broker until after the closing of this transaction. (T.T. at 484, 556-57).

(x) By August 20, 1992, Haws Companies had learned that Diversified was complaining about this transaction, and after learning of that, Haws Companies terminated its affiliation with Knapp. (T.T. at 470-71).

(y) Diversified chose to affirm the sale of the property and not rescind the transaction, which was a voidable transaction. Consequently, Diversified retained the

property and at the same time sued for fraud for being induced into the purchase of the property.

(z) The jury was not allowed to hear testimony that Diversified (by a successor) took the property that it had purchased in June 1992 for $785,000.00 and sold it in May 1996 for $1,200,000.00. Further, the jury was precluded from hearing testimony that Knapp's tender of recission of the transaction was refused.

(aa) Richard Knapp was relatively youthful at the time of the conduct, being only 26 years old.(R. at 2084). There was no evidence that Richard Knapp had done the conduct that he was accused of doing prior to this incident or after the incident.(R). Richard Knapp was not an active real estate agent and in fact had done only one (1) real estate transaction as an agent prior to that time and none after that time.(T.T. at 331). Richard Knapp had a less active role and passive role in the transaction than did Gilbert Turner.(R. at 2092). Parish testified that Knapp never made a misrepresentation regarding the transaction.(T.T. at 167). Richard Knapp surrendered his real estate licence to the licencing agency and has not received or applied for a reinstatement of his licence. Therefore, Richard Knapp cannot be in a position to perpetrate the same conduct in the future. Richard Knapp was terminated by Haws over the conduct that resulted in the punitive damage award. (T.T. at 249).

(bb) Richard Knapp sought to rescind the transaction when there was concern that the plaintiffs were dissatisfied with the transaction.(T.T. at 11).

(cc) With regard to defendant University specifically, University participated in the

wrongful conduct only through Richard Knapp.(R. at 2079). University sole participation was to own the property prior to the sale to the Diversified.(Id.) There was no evidence of University's wealth. (Id.)

(dd) With regard to defendant Haws Companies specifically, Haws Companies terminated Richard Knapp over the conduct that resulted in the punitive damage award.(T.T. at 249). Haws Companies terminated Gilbert Turner before this conduct that resulted in the punitive damage award became known to Haws Companies when other unrelated improprieties that were unrelated to Haws Companies came to light.(T.T. at 202). The jury verdict against Haws for punitive damages is roughly 25% of its net worth.(R. at 2076). Haws Companies never received any remuneration for the sale transaction between Diversified and University.

(ee) With regard to defendant Gilbert Turner specifically, Gilbert Turner surrendered his real estate licence to the licencing agency and has not received or applied for a reinstatement of his licence.(R. at 2090). Therefore, Gilbert Turner cannot be in a position to perpetrate the same conduct in the future.(Id.) No evidence of Gilbert Turner's wealth was submitted to the jury.(R. at 2093).

(ff) Based upon the foregoing, the jury initially awarded the following damages to Diversified:

a. Defendant	b. Fraud[1]	c. Punitive	d. Ratio (c to b)	e. Negligence	f. Total (b+c+e)
Turner	$71,336.00	$2,250,000.00	30.6 to 1	$84,000.00	$2,405,336.00
Knapp	$71,336.00	$1,750.000.00	23.8 to 1	$73,500.00	$1,821,336.00
University	$71,336.00	$1,000,000.00	13.6 to 1	$-0-	$1,071,000.00
Haws	$71,336.00	$130,500.00	1.7 to 1	$52,500.00	$254,336.00
Total:	**$71,336.00**	**$5,130,500.00**	**69.8 to 1**	**$210,000.00**	**$5,411,836.00**

(gg) The trial court judge reviewed the matter on a motion for new trial and remitted the judgment, offering Diversified a new trial or to accept the remitted judgment, to the following:

a. Defendant	b. Fraud[2]	c. Punitive	d. Ratio (c to b)	e. Negligence	f. Total (b+c+e)
Turner	$71,336.00	$208,257.00	2.9 to 1	$26,000.00	$305,593.00
Knapp	$71,336.00	$500,000.00	7 to 1	$22,750.00	$594,086.00
University	$71,336.00	$214,000.00	3 to 1	$-0-	$285,336.00
Haws	$71,336.00	$130,500.00	1.8 to 1	$16,250.00	$218,086.00
Total:	$71,336.00	$1,052,757.00	14.75 to 1	$65,000.00	$1,403,101.00

Diversified choose not to retry the matter and accepted the remittitur.

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1 This amount is joint and several with all defendants.

2 This amount is joint and several with all defendants.

Appendix C

APPENDIX C

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Diversified Holdings Co., L.C.,	:	
Plaintiff	:	Memorandum Decision
vs.	:	Date: June 8, 2000
Gilbert R. Turner, et. al.,	:	Case Number: 930400136
Defendant	:	Division V: Judge James R. Taylor

This matter comes before the Court on the motion of Defendants Richard M. Knapp, University Properties, Inc. and The Haws Companies for a new trial or, in the alternative, a remittitur of damages. Those three Defendants have asked that the motion be extended to include the judgment against the additional Defendant Gilbert R. Turner which was allowed by this Court. The Defendants do not challenge, by this motion, the jury verdict except as to separate damages for negligence, an apparent award of damages for interest on money loaned to the Plaintiff by Defendant Richard Knapp in connection with the subject transaction and the amount of punitive damages awarded.

Rule 59(a)(6) of the Utah Rules of Civil Procedure allows a verdict to be set aside if there is insufficient evidence to sustain the verdict. "A trial court cannot grant a new trial if there is sufficient evidence to support a verdict for either party and the judge merely disagrees with the judgment of the jury. Mere disagreement is not a sufficient basis on which to set aside a verdict and order a new trial," Crookston v. Fire Insurance Exchange, 817 P.2d 189 at 799 (Utah, 1991).

A trial court may set aside a verdict and grant a new trial when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice, Id. at 803.

The Utah Supreme Court has noted, in Crookston, supra at 813 that:

> A trial judge, in proposing a remittitur or additur, only does so as an alternative to granting a new trial. This is true because a trial judge may only remit the damages if he or she finds them excessive or add to them if he or she finds them inadequate–which is one of the grounds for granting a new trial. Thus, if a plaintiff does not want to accept the proposed remittitur, he or she may elect to retry the matter.

In considering a challenge to a jury verdict on the basis of insufficient evidence under Rule 59(a)(6) of the Utah Rules of Civil Procedure this Court must construe the evidence in favor of the verdict. In this case the jury was asked to determine if there was fraud and/or negligent misrepresentation. They were also instructed and asked to determine if the defendants had breached a standard of care under a simple negligence theory. Both questions were answered affirmatively. Those conclusions are not challenged by this motion. The jury then determined that damages of $71,336.00 resulted from the fraud and/or negligent misrepresentation. The next question put to the jury asked them to ". . . state the amount of additional damages, if any, sustained by the plaintiff as a proximate result of the negligence" (Emphasis added).

As this Court views the evidence, the fundamental fraud claim was that the defendants lied and misrepresented the price Mr. Knapp or his corporation, Defendant University Properties, paid for the property being sold to the Plaintiff and they lied about, misrepresented or hid the nature of

their interest and role in the transaction. Such behavior could certainly have been characterized as simple negligence, as well. However, Mr. Parrish testified that he expected to pay much less for the building than he did. He was shocked and surprised at the final number but, by then, felt compelled to complete the deal because he had committed $70,000.00 at the insistence of Mr. Turner. His estimate of the proper purchase price was first stated at $600,000.00 to $700,000.00 then revised to $650,000.00 to $700,000.00.

The negligence, apart from the outright misrepresentation, that occurred in this case resulted in the failure of the defendants to professionally represent the Plaintiff as real estate professionals to obtain the most reasonable price possible for the property. Stated differently, this jury could have concluded that had the defendants acted professionally, they might have negotiated the price Mr. Parrish expected, resulting in a purchase price of $650,000.00 instead of $785,000.00. That is a difference of $135,000.00. Of that, $70,000.00 was the inflated amount created by the misrepresentation and fraud. $1,336.00 exactly corresponds to the interest or fee charged on the loan for $50,000.00 which the Plaintiff argued and the jury apparently found to be another fraudulent scheme. The remaining difference in purchase price would then be $65,000.00. There was no other evidence of damage presented or argued to the jury. The jury award of $210,000.00 for "additional damages, if any, sustained by the plaintiff as a proximate result of the negligence" cannot, therefore be sustained beyond the amount of $65,000.00. Accordingly, a remittitur to the award for negligence in the amount of $145,000.00 will be

allowed to bring the total amount awarded as damages for negligence to $65,000.00.

Rule 59(a)(5) of the Utah Rules of Civil Procedure provides that a trial court can also grant a new trial if the damages awarded are "excessive [in amount] . . . appearing to have been given under the influence of passion or prejudice." In Crookston, supra, the Utah Supreme Court created a presumption that if the ratio of punitive damages to actual damages exceeds a specified ratio, they are excessive and must be supported by specific findings of the trial court to be sustained.

> Any motion for a new trial on the question of punitive damages requires that the trial court engage in a two-part inquiry: (i) whether punitives are appropriate at all, i.e. whether the evidence is sufficient to support a lawful jury finding of defendant's requisite mental state, . . . and (ii) whether the amount of punitives is excessive or inadequate, appearing to have been given under the influence of passion or prejudice. Id. at 807.

The Defendants do not challenge the verdict under part i of the Crookston process. They rely, in total, upon the ratio of damages awarded to punitive damages to support their claim that the punitive damages are excessive.

Seven factors have been outlined to be considered in assessing the amount of punitive damages including: 1) the relative wealth of the defendant, 2) the nature of the alleged misconduct, 3) the facts and circumstances surrounding such conduct, 4) the effect thereof on the lives of the plaintiff and others, 5) the probability of future recurrence of the misconduct, 6) the relationship of the parties and, 7) the amount of actual damages awarded. The damages awarded against each of the Defendants will be considered in the framework of the seven identified factors.

Gilbert R. Turner

The jury awarded damages against Mr. Turner as follows:

Fraud or negligent misrepresentation:	$71,336.00
Additional damages as a proximate result of negligence:	$26,000.00
Money received through violation of UCA 61-2-11	$ 41,502.00
Punitive Damages	$2,250,000.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants. The additional damages proximately resulting from negligence are apportioned from a total of $65,000.00, reduced from the verdict amount as noted above. After receiving the verdict the Plaintiffs elected to receive punitive damages rather than an award based upon the money received through a violation of U.C.A. section 61-2-11. Interest accrues on the various amounts at the statutory rate of interest (7.670% per annum).

I. Relative Wealth of Richard Turner

The Utah Supreme Court identified, as the first factor to be considered, the "relative wealth of the Defendant." Relative to whom? In this case Mr. Turner appears to be the least wealthy of any of the Defendants. No evidence was presented at any time identifying any net worth of Mr. Turner although he was a real estate broker for a substantial time in California before coming to Utah. In California he owned his own business. He appears to have a home in Park City although there was no evidence from which the Court can determine that he owned,

rented or borrowed the property. In the months just preceding the subject transaction in 1992, Mr. Turner got into trouble for appropriating $5,000.00 from a trust account. He borrowed the money to repay the account from Mr. Knapp. Although Mr. Turner appeared on the first day of trial and asserted a need for support and travel expenses to come to the trial, there is no other evidence to support any substantial conclusion about Mr. Turner's wealth, relative to anybody.

II. The Nature of the Misconduct of Richard Turner

Mr. Turner's conduct in this case was core to the fraud that was perpetrated upon the Plaintiff. Mr. Turner drafted the contract for the purchase, by Mr. Knapp, of the subject property from First Security Bank. He then lied to the Plaintiffs by feigning a lack of knowledge about the purchase price from First Security Bank and then pretended to call Mr. Knapp to set the re-sale price to the Plaintiffs at $785,000.00. He did not cooperate with his broker, the Haws Company, to allow adequate supervision. He knew that Mr. Knapp was a licensed agent, having introduced Mr. Knapp to the Haws Company for that purpose and yet he kept that fact away from the Plaintiffs. He took a kick-back fee from a bank to arrange financing for the Plaintiff. He offered and carried out the motions as if to represent the Plaintiff but acted as an agent for Richard Knapp, University Properties and himself, ultimately splitting profits from the resale of the building to the plaintiffs. He plainly lied about the reason for the price by saying that a third party had offered $750,000.00 for the building. He took advantage of the Plaintiff's short term need for cash to close the deal by manipulating a request for money under circumstances any reasonable

person would have interpreted as a desire for a loan at 10% per annum into a loan at 120% per annum. In short virtually all of the deception that occurred in this case was carried out through the lies, statements and activity of Mr. Turner acting by himself or in concert with other defendants.

III. The Facts and Circumstances of the Case

The facts and circumstances of the case, as related to Mr. Turner, are largely described in the preceding paragraph. After committing the Plaintiff to the purchase by obtaining a non-refundable deposit he used the same money to commit First Security Bank to sell to Mr. Knapp thereby insuring substantial profit with little or no cash outlay for himself or Mr. Knapp. He managed to obtain, in addition to a 50% share of the profits from the sale, a real estate commission on both deals and a kickback from the bank providing funding for the Plaintiff. All the while he represented himself to the Plaintiff as their agent.

IV. The Effect Upon the Lives of the Plaintiff and Others

The only evidence received regarding the effect of this transaction upon the Plaintiff was that the profit they subsequently realized was reduced by the amount they were defrauded in the purchase of the building. Nothing regarding the re-sale of the building was presented to the jury. An expert witness testified as to three possible values of the building, all substantially more than either purchase price. However it was demonstrated in cross examination that some of the data relied upon by the appraiser may have been flawed. There was no other evidence of the impact of

this conduct upon the lives of Plaintiffs or others.

V. The Probability of Future Recurrence of the Misconduct

Mr. Turner has surrendered his real estate license. He was the subject of discipline for an earlier indiscretion and appears to be chronically unable to tell the truth. Most witnesses who knew of him indicated that he has a penchant for half truths and misrepresentation. He has been in the real estate business for a substantial period of time. Nevertheless, unless he simply ignores the licensing laws of the State and attempts to act as a broker or agent without a license, it is unlikely that he will be in a situation for this conduct to be repeated. He appears to have no real estate license or position. There is not a high probability of this conduct being repeated by Mr. Turner.

VI. The Relationship of the Parties

Mr. Turner's principal asset appears to be the ability to sell. He was hired and used by Mr. Knapp when Mr. Knapp was concerned that others might not accept him as legitimate because of his age. He ingratiated himself to Mr. Parrish and convinced him of the need to purchase the building and make a profit. He befriended Mr. Knapp and appears to have gained the confidence of Richard Haws, even though an investigation into his practices began just before Mr. Haws transferred his license to the Haws Companies. However, other than those relationships in the general business context, there is no evidence in this case of relationships that would impact a punitive damage award.

VII. The Amount of Actual Damages Awarded

In comparing the damages awarded to the amount of punitive damages the Supreme Court in the second Crookston case, 860 P.2d 937 at 940 (1993) noted that "[s]oft compensatory damages, "which must be awarded with caution," . . . are not to be given equal weight with hard compensatory damages when evaluating the relationship between punitive and compensatory damages." This case did not involve any damages identified as general or resulting from pain and suffering. As noted above, there was not evidence on that point. The Plaintiff was led to believe that they were purchasing the building for $15,000 more than Mr. Knapp had paid for the building, repaying his $5,000.00 "unrefundable" payment for the option and allowing a $10,000.00 profit. Mr. Parrish expected to pay much less for the building, estimating the value at $650,000.00 to $700,000.00. There was testimony that the $5,000.00 was returned to Mr. Turner by the bank when he delivered the $70,000.00 obtained from the Plaintiff. Mr. Knapp said he never received the money and no other explanation of what happened to that money was presented.

The verdict form required the jury to determine, first, if the Defendants committed the torts of fraud and negligent misrepresentation. It called for a determination of an amount that would reasonably compensate the Plaintiff for the injury caused. That amount was set by the jury at $71,336.00. The jury was then asked to apportion the simple negligence among the defendants Mr. Turner, Mr. Knapp, Mr. West and the Haws Companies, all of whom were real estate

professionals. Mr. Turner's responsibility was set at 40%. Since the damage resulting from negligence has been remitted to a reasonable measure of the actual cost of the unprofessional representation, the negligence damages are considered to be "hard." Interest accumulated since the date of judgment accrues after the judgment was entered and was not determined by the jury. Consequently, it cannot be considered in reviewing the jury verdict to determine if the award was reasonable. The Plaintiff elected to not receive any award resulting from the statutory violation. That leaves, for Mr. Turner, a total of $97,336.00 in compensatory damages to be compared to punitive damages of $2,250,000.00. The ratio is approximately 1 to 23.

Summary: Gilbert R. Turner

To review the 7 Crookston factors: 1) There is no evidence from which the jury or this Court can conclude anything about the relative wealth of Mr. Turner; 2) Mr. Turner's conduct was substantially egregious and core to the fraud that was perpetrated upon the Plaintiff; 3) Mr. Turner manipulated and took advantage of the circumstances to carry out the fraud; 4) there was no evidence of substantial impact upon the lives of the Plaintiff or others; 5) there is a low probability that Mr. Turner will engage in this sort of conduct in the future because there is no evidence that he will have any opportunity to do so, 6) there was no evidence of unusual or sensitive relationships other than created in a business environment related to this fraud, and, 7) the ratio of compensatory damages to punitive damages, 1 to 23, is extreme.

With regard to Mr. Turner, this Court concludes that punitive damages of $2,250,000.00

is extreme and unnecessarily high. The amount clearly exceeds the proper ratio established by the Supreme Court for punitive damages. The evidence of Mr. Turner's knowledge and malice was substantial. The actions were certainly not benign. There is no evidence, one way or the other, as to whether the award would risk bankrupting Mr. Turner although a man who demands car fare to come to court would probably have a difficult time paying well over two million in damages. Even though the Plaintiff elected to not receive compensation from the violation of the statute governing conduct of real estate agents, that statute would have allowed a penalty of up to three times the compensation received by virtue of the tainted conduct. The jury determined that compensation to be $41,502.00 for Mr. Turner. The possible penalty would have been $124,506.00. A 1 to 3 ratio, as approved by the Supreme Court from compensatory damages would put punitive damages at $292,008.00. This Court is satisfied, primarily because Mr. Turner is unlikely to have an opportunity to repeat this conduct, that an appropriate penalty is somewhere between those amounts. Accordingly, this Court will authorize a remittitur to the punitive damages portion of the award against Mr. Turner of $2,041,743.00 resulting in a total punitive damage award of $208,257.00.

Richard M. Knapp

The jury awarded damages against Mr. Knapp as follows:

Fraud or negligent misrepresentation:	$71,336.00
Additional damages as a proximate result of negligence:	$22,750.00

Money received through violation of UCA 61-2-11	$ 60,946.00
Punitive Damages	$1,750,000.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants. The additional damages proximately resulting from negligence are apportioned from a total of $65,000.00, reduced as noted above. After receiving the verdict the Plaintiffs elected to receive punitive damages rather than an award based upon the money received through a violation of U.C.A. section 61-2-11. Interest accrues on the various amounts at the statutory rate of interest (7.670% per annum).

I. The Relative Wealth of Richard Knapp

As a contrast to Mr. Turner, Mr. Knapp appears to be the most wealthy of any of the Defendants. Expert testimony placed his net worth at more than five million, estimated conservatively. He testified that he closed on the purchase of a 311 unit apartment building five months after the deal with the Plaintiffs which was a 16.5 million dollar deal requiring a million dollars down. Although he told Mr. Turner that he couldn't or wouldn't pay the $70,000.00 down if the Plaintiff didn't, he testified that he had access to that amount of cash and now regularly makes real estate loans for which he charges a 10% fee plus 18% per annum. He testified that he currently owns more than 1,000 rental units in three states. When the transaction with the Plaintiff was done Mr. Knapp, although a full time law student and MBA candidate at BYU, owned a 96 unit rental property, two convenience stores, a circuit board manufacturing

company and the building used by University Properties. He was and is a 90% owner of University Properties.

The principal parties for the Plaintiff were not poor men. Wes Parrish was CEO of Parish Chemical, a company he founded and principally owns. He owns or was involved with 6 other companies and had substantial business experience. His partner, Don Wooley, had substantial experience as a scientist for a series of major corporations. He invented the "FLAIR" pen for Papermate. He worked for McDonald-Douglas and Hercules Corp. although, by his own admission, had not made money in those positions. Mr. Wooley felt he had made money in real estate. Through his deposition he established that he had bought and sold several residences, a duplex, a four-plex and a six-plex. At the time of his deposition he owned a home and a condominium in Santa Clara. He felt he had cash to contribute to the Plaintiff to put together this purchase although his inability to obtain $50,000.00 of the funds needed by the time for closing led to the need to borrow that amount from Mr. Knapp.

II. The Nature of the Misconduct of Mr. Knapp

Mr. Knapp, while attending law and business school at BYU became heavily involved in the purchase, sale and management of real property. In an effort to avoid paying real estate commissions, he obtained a real estate sales license. Out of a desire to "put in the time" to make it possible to obtain a broker's license, he "hung his license" with the Haws Companies but affirmatively avoided training or supervision. He negotiated an unusually favorable commission

split with the Haws Companies specifically including in the contract that he would maintain a "branch office" in Provo. The commission split was claimed by him and honored by the Haws Companies. This Court concludes that the balance of the contract was in force and that Mr. Knapp made his University Properties office available for the use of Mr. Turner and the Haws Companies pursuant to that agreement.

Mr. Knapp was the first of any of the parties to notice that the Temple View Terrace property was for sale in April of 1992. He had utilized Mr. Turner on an unspecified number of previous deals because Mr. Turner gave credibility to his position. Mr. Turner was older, presented himself well and gave an impression of confidence and maturity. Mr. Knapp was a 26 year old student who had done very well in real estate development but, frankly, looked his age. Mr. Knapp instructed Mr. Turner to obtain information about the building. Mr. Knapp reviewed the information and determined that it was a distressed sale and felt he could make money by purchasing the property. He approved the earnest money offer to purchase from First Security Bank that was prepared by Mr. Turner. He also directed and approved the sale to the Plaintiff. He met with Mr. Parrish on the site and did not disclose that he was an agent with the same agency as Mr. Turner or that he had a partnership to share in the proceeds from the sale of the building to the Plaintiff. He created artificial pressure on Mr. Turner by telling him that he would not pay the $70,000.00 down payment to First Security Bank requiring Mr. Turner to take whatever steps were possible to commit the Plaintiff to paying the money. When Mr. Knapp

learned that Mr. Turner had been untruthful, instead of acting promptly to rectify the misunderstanding or instructing Mr. Turner to tell the truth, he did nothing but hope the Plaintiff didn't discover the truth. Mr. Knapp affirmatively instructed the title company on the day both deals closed to keep the purchase price paid for the property from the Plaintiff. Mr. Knapp knew the nature of the deal. He created or approved of the structure and benefitted from it.

III. The Facts and Circumstances Surrounding the Conduct

The facts and circumstances with regard to Mr. Knapp are substantially the same as described above as relating to Mr. Turner or implicit from the recitation of the conduct of Mr. Knapp.

IV. The Effect of the Misconduct on the Lives of the Plaintiff or Others

Mr. Turner has, perhaps appropriately, lost his ability to continue in his vocation as a real estate professional because he found himself used and manipulated by Mr. Knapp. By contrast, the loss of the status as "real estate professional" will have little or no impact upon Mr. Knapp since he always has viewed the designation as a convenience or sideline and not his principal vocation. As noted above, the Plaintiff has suffered an economic loss by being required to pay more for the building than they should have with the misconduct of Mr. Knapp.

V. The Probability of Future Recurrence of the Misconduct

The evidence leads this Court to a substantial concern in this area with regard to Mr. Knapp. He has created a large net worth in a short time through real estate investment and

dealing. He demonstrated an incredibly arrogant and uncaring attitude on the stand when asked about the lies and half-truths propounded by Mr. Turner as his behest. In spite of his training as a real estate professional, completion of law school and a degree in business administration he appears to be perfectly willing to place an opportunity for personal profit ahead of ethical fair dealing. Once the jury in this case had determined that punitive damages were warranted by the evidence, he absented himself from the proceedings. He was not present during evidence or argument related to the proper amount of punitive damages. That behavior was not lost on the jury or the Court. This Court concludes that unless Mr. Knapp changes his conduct and attitude that a very real possibility exists that Mr. Knapp will seek and exploit circumstances such as this on a future occasion.

VI. The Relationship of the Parties

Mr. Parrish was and is an experienced scientist and businessman. Mr. Wooley considered himself knowledgeable in real estate matters but, particularly in comparison with the Defendants, was also relatively inexperienced. He noted that he relied upon real estate professionals, accountants and lawyers when dealing in such matters. Mr. Knapp had or was receiving substantial training about the intricacies of real estate transactions. Mr. Turner was a very competent salesman capable of being manipulated by Mr. Knapp. The Haws Companies were perfectly willing to associate Mr. Knapp and Mr. Turner to benefit through commissions from the real estate business Mr. Knapp was involved in and from having a "presence" in the Provo area

through a branch office but not in providing substantive training and supervision. These relationships combined to make the fraud established in this case possible. Mr. Knapp, in particular, fostered and took advantage of relationships with co-defendants for his own particular profit.

VII. The Amount of Actual Damages Awarded

The jury concluded that damages attributable to Mr. Knapp included $71,336.00 from the fraud/negligent misrepresentation. The negligence damages have been reduced by this decision to $22,750.00. Punitive Damages against Mr. Knapp totaled $1,750,000.00. Following the computation explained for Mr. Turner, above, the totals are $94,086.00 to $1,750,000.00 for a ratio of about 1 to 19.

Summary: Richard Knapp

To review the 7 Crookston factors regarding Mr. Knapp: 1) Mr. Knapp is most likely the most wealthy of any of the parties (although there was no evidence from which the Court can conclude the net worth of Mr. Parrish or Mr. Wooley). 2) Mr. Knapp knowingly initiated and took advantage of the full scheme to defraud the Plaintiff. His conduct was extensive and egregious. 3) The circumstances surrounding the conduct were manipulated and utilized by Mr. Knapp to facilitate the fraud. 4) The Plaintiff was forced to spend more on the property than it wanted. Mr. Turner, who certainly was not blameless, ended up unable to engage in a profession that appears to have been his main vocation for some time. Mr. Knapp and his general business

interests, except for the impact of this judgment, are largely unaffected. 5) Unless forced to change his business practices and outlook there is a substantial possibility that Mr. Knapp will seek and take advantage of similar circumstances in the future. 6) Mr. Knapp accomplished much of the fraud in this case by creating and manipulating special relationships–particularly with other defendants. 7) Damages awarded by the jury as compared to punitive damages were in a ratio of about 1 to 19 which substantially exceeds the Supreme Court guidelines.

The punitive damage award exceeded the proper ratio but Mr. Knapp's behavior was knowing and active. He does not run a substantial risk of bankruptcy from the damages awarded. Because Mr. Knapp's behavior was so key to this scheme and because of the need to create a disinclination for such conduct to be repeated, this Court concludes that although punitive damages in the amount awarded by the jury are excessive, the damages should exceed the 1 to 3 ratio guideline established by the Supreme Court. This Court concludes that punitive damages in the amount of $500,000.00 are reasonable and just. His total judgment, in that circumstance, would be approximately 10% of his conservative net worth. This is not an amount intended to bankrupt but, instead, to send a very strong message regarding future conduct. A remittitur, then, of $1,250,000.00 will be authorized to reduce the punitive damage award against Mr. Knapp to $500,000.00.

University Properties

The jury awarded damages against University Properties as follows:

Fraud or negligent misrepresentation:	$71,336.00
Punitive Damages	$1,000,000.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants.

I. Relative Wealth of University Properties

There was no evidence of the relative value of University Properties. Richard Knapp is or was a 90% owner of the company and it is presumed that the value of the company is included in the assessment of his net worth.

II. The Nature of the Alleged Misconduct of University Properties

As the jury was instructed, a corporation may only act through it's agents. In this case Richard Knapp took actions attributable to University Properties when he cause the company to purchase the property from First Security Bank and then almost immediately re-sell the property to the Plaintiffs making a fraudulent profit (and, at the same time, earning a real estate commission for Mr. Knapp). There was no testimony or evidence of any corporate act of University Properties taken by any person other than Mr. Knapp.

III. The Facts and Circumstances Surrounding the Conduct

There is nothing regarding facts and circumstances related to University Properties that differs from the explanation given above for Mr. Knapp.

IV. The Effect on the Lives of the Plaintiff and Others

Any impact upon other persons by the actions attributable to University Properties is explained above under the section for Mr. Knapp.

V. The Probability of Future Recurrence of the Misconduct

As noted above, without substantial penalty and intervention, Mr. Knapp is likely to seek and utilize additional opportunities for fraud. University Properties is a company that Mr. Knapp has utilized for his real estate activities in the past. Although the most important rehabilitative impact of punitive damages will be upon Mr. Knapp, himself, the corporation has also misbehaved through Mr. Knapp and should bear some of the responsibility. The Court notes, in particular, that Mr. Knapp made careful distinction between activities he took as an "agent" and activities of the corporation such as purchase and sale of the building.

VI. The Relationship of the Parties

Except to re-state that University Properties is completely dominated and controlled by Mr. Knapp and to refer to the relationships section for Mr. Knapp, no additional evidence on this point was presented at trial.

VII. The Amount of Actual Damages Awarded

The ratio of compensatory damages to punitive damages for University Properties was 1 to 14.

Summary: University Properties

In reviewing the Crookston factors with regard to University Properties, it is difficult and

not particularly helpful to separate the corporation from the conduct of Richard Knapp. While there was no evidence to justify piercing the corporate veil and disregarding that corporate entity, the misbehavior of the corporation completely resulted from the mis-deeds of Mr. Knapp. The is some need for a message of rehabilitation to be given to the company but not at a ratio to compensatory damages of 14 to 1. This Court concludes that punitive damages to the corporation in the approved ratio of 3 to 1, or $214,000.00 is more reasonable. Accordingly, a remittitur to the punitive damages judgment against University Properties of $786,000.00 will be allowed to reduce the total punitive damage award against that corporation to $214,000.00.

The Haws Companies

The jury awarded damages against The Haws Companies as follows:

Fraud or negligent misrepresentation:	$71,336.00
Additional damages as a proximate result of negligence:	$16,250.00
Money received through violation of UCA 61-2-11	$ 4,200.00
Punitive Damages	$130,500.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants. The additional damages proximately resulting from negligence are apportioned from a total of $65,000.00, reduced as noted above. After receiving the verdict the Plaintiffs elected to receive punitive damages rather than an award based upon the money received through a violation of U.C.A. section 61-2-11. Interest accrues on the various amounts at the

statutory rate of interest (7.670% per annum).

The ratio of compensatory damages to punitive damages, consistent with the analysis already employed, is about 1 to 1.5 ($87,586.00 to $130,500.00). The punitive award represents exactly 25% of the net worth established for the Haws Companies by expert testimony which is also the percentage of responsibility for the total negligence determined by the jury. The ratio is well within the established Supreme Court no further analysis of the award is necessary. Nevertheless, a brief review of the Crookston factors relative to the Haws Company may also be valuable in the event this award is considered.

I. The Relative Wealth of the Haws Companies

All that can be said of the Haws Companies' relative wealth is that the company is worth less than Mr. Knapp. The company had an office in Salt Lake, wanted an office in Provo and, for a time, managed a development near Mr. Knapp's office in Provo. None of that informs as to the relative wealth of the Haws Companies. The company's net worth was $522,000.00.

II. The Nature of the Alleged Misconduct

The Haws Companies, through it's owner Mr. Haws, hired Mr. Turner in spite of a somewhat checkered status with the State of Utah. They allowed Mr. Knapp to "hang his license" solely to gain time but not to foster, train and guide as a real estate agent moved to becoming a real estate broker. They were willing to associate with him to collect fees and participate in his real estate business as a principal. When confronted with the misconduct their

most significant response was to demand their share of any commission and fire Mr. Turner and Mr. Knapp. They made no attempt whatsoever to rectify the injustice created by the fraud of their agents.

III. The Facts and Circumstances Surrounding the Conduct

As above, the facts and circumstances surrounding the conduct are largely indistinguishable from the conduct, itself. The simple conclusion is that the Haws Companies neglected to keep the faith with the public they assumed by becoming a real estate brokerage firm. A negligent, distant company combined with aggressive and less than ethical agents resulted in a fraud which they failed to rectify upon discovery.

IV. The Effect on the Lives of the Plaintiff and Others

There is no additional information, beyond that discussed above, about the effect of the conduct of the Haws Companies upon the lives of others.

V. The Probability of Future Recurrence of the Misconduct

The Haws Companies are in the business of dealing in real estate. The company has taken it upon itself to recruit, supervise and train real estate professionals. The company continues to be licensed and regulated by the State of Utah. If allowed to engage in these practices without penalty, the possibility for a recurrence of this or similar type of harm from agents of the Haws Company is certainly possible or likely.

VI. The Relationship of the Parties

As noted above, the Haws Companies allowed itself to be used and manipulated by Mr. Knapp and Mr. Turner to facilitate the fraud perpetrated upon the Plaintiff. The relationship was an important part of the deception used to shield the undisclosed profit. Mr. Turner was in the business of marketing real estate because Haws Company contracted with him for that purpose.

VII. The Amount of Actual Damages Awarded

As noted above, the ratio of compensatory damages to punitive damages is approximately 1 to 1.5.

Summary: The Haws Company

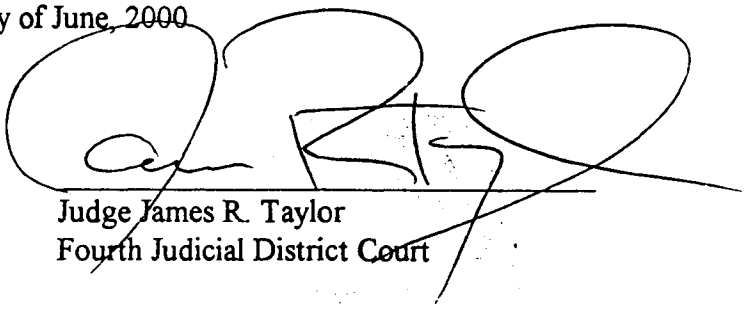
The award in this case does not exceed the approved ratio. Although the conduct of the Haws Companies was, at the time of the actual fraud, relatively benign and without malice, the company did not take advantage of an opportunity to correct an error but, instead acted to protect it's "fee position" by seeking to collect real estate commissions and fire the agents. The award is 25% of the company's net worth making the possibility of bankruptcy from the award remote. This Court concludes that the jury determination of punitive damages against the Haws Company was appropriate and will not authorize a further remittitur of that amount.

Conclusion

In summary, this Court concludes that the evidence available to support an award of damages proximately cause by the negligence of the defendants must be reduced by $145,000.00 to $65,000.00. The fraud damages are supportable by evidence of $70,000.00 increased price

from the misrepresentations and deceit of the defendants and $1,333.00 charged for a loan also created through fraudulent conduct of the defendants. The Court has concluded that punitive damages awarded against Gilbert R. Turner, Richard Knapp and University Properties were excessive. Remittiturs of $2,041,743.00 to the punitive award against Mr. Turner, $1,250,000.00 to the punitive award against Mr. Knapp and $786,000.00 to the punitive award against University Properties are authorized. The award against the Haws Companies is not found to be excessive and no remittitur will be allowed. Counsel for the Defendants is instructed to prepare appropriate modified judgments showing the reduced awards to be submitted to counsel for the Plaintiff for approval as to form. The Plaintiff, as explained in Crookston, supra at note 31 on page 813, may then elect to accept the reduced judgment or re-try this matter against Defendants Gilbert R. Turner, Richard Knapp and University Properties.

Dated this 12th day of June, 2000



Judge James R. Taylor
Fourth Judicial District Court

A certificate of mailing is on the following page.

Diversified Holding Co., Ltd. v. Gilbert R. Turner, et. al.: 930400136. Memorandum Decision of June 12, 2000.

Copies of this Order mailed to:

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Holman Walker & Hutchings, L.C.
9527 South 700 East
Salt Lake City, Utah 84070

Mailed this 12 day of June 2000, postage pre-paid as noted above.

Court Clerk

Appendix D

APPENDIX D

3.104.1

NEST MONEY SALES AGREEME

EARNEST MONEY RECEIPT

ond Yes(X) No(O)

DATE: MAY 15 1992

e undersigned Buyer DIVERSIFIED HOLDINGS CO. LC hereby deposits with Broke
ARNEST MONEY, the amount of SEVENTY THOUSAND Dollars ($ 70,000
e form of CASHIERS CHECK PAYABLE TO AND DEPOSITED WITH FIRST SECURITY
shall be deposited in accordance with applicable State Law. BANK WHICH SHALL APPLY TO THE PURCHASE PRICE.

Received by

erage Phone Number

OFFER TO PURCHASE

PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 1325 So. 500 E in the City of OREM County of UTAH Utah,
ct to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in
dance with Section G. Said property is ~~owned by~~ IS HELD IN LEASEABLE TITLE BY UNISEARCH PROPERTIES as sellers, and is more particularly described
H 19,600 + SQ. FT. TRI LEVEL OFFICE BUILDING

ECK APPLICABLE BOXES:

UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other

IMPROVED REAL PROPERTY ☒ Commercial ☐ Residential ☐ Condo ☐ Other

) Included Items. Unless excluded below, this sale shall *include* all fixtures and any of the items shown in Section A if presently attached to the property.
he following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: NONE

) Excluded Items. The following items are specifically *excluded* from this sale: NONE

) CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price:

public sewer	☒ connected	☐ well	☐ connected	☐ other	☒ electricity ☒ connected
septic tank	☐ connected	☐ irrigation water / secondary system			☐ ingress & egress by private easement
other sanitary system		# of shares	Company		☒ dedicated road ☒ paved
public water	☒ connected	☐ TV antenna	☐ master antenna	☐ prewired	☒ curb and gutter
private water	☐ connected	☒ natural gas	☒ connected		☐ other rights

Survey. A certified survey ☒ shall be furnished at the expense of SELLER prior to closing, ☐ shall not be furnished.

Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 7(c) above and 6 below, accepts it in its present physical
ndition, except: COMPLETION OF INSTALLATION OF HVAC CONTRACT DATED APRIL 2
92 BY ROYDEN, INC. AND PAID BY FIRST SECURITY BANK

URCHASE PRICE AND FINANCING. The total purchase price for the property is SEVEN HUNDRED AND EIGHTY
IVE THOUSAND Dollars ($ 785,000) which shall be paid as follows:

70,000 which represents the aforedescribed EARNEST MONEY DEPOSIT: CASHIERS CHECK PAYABLE TO FIRST SECURITY BANK

5,000 representing the approximate balance of CASH DOWN PAYMENT at closing.

_____ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer,
which obligation bears interest at _____ % per annum with monthly payments of $ _____
which include: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other _____.

_____ representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be
assumed by Buyer, which obligation bears interest at _____ % per annum with monthly payments of $ _____
which include: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other _____.

_____ representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows: _____

_____ Other _____

5000 TOTAL PURCHASE PRICE

er is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts
e and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer a
application within 10 days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obta
st rate not to exceed _____ %. If Buyer does not qualify for the assumption and/or financing within _____ days a
agreement, this Agreement shall be

PLAINTIFF'S EXHIBIT

CONDITION AND CONVEYANCE OF TITLE. represents that Seller ☒ holds title to the property simple ☐ is purchasing the property under a real contract. Transfer of Seller's ownership interes... be made as set forth in Section S. Seller agrees to t... good and marketable title to the property, subject ...umbrances and exceptions noted herein, evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current, n attorney's opinion (See Section H).

INSPECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title t to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☒ has not reviewed any condominium CC & R's prior to signing this Agreement.

VESTING OF TITLE. Title shall vest in Buyer as follows: AS DIRECTED AT CLOSING

SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: NONE

tions to the above and Section C shall be limited to the following: NONE

SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied o closing: NONE

CLOSING OF SALE. This Agreement shall be closed on or before JUNE 15, 19 92 at a reasonable location to be designated by subject to Section Q. Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with ...reement. Prorations set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other

POSSESSION. Seller shall deliver possession to Buyer on CLOSING unless extended by written agreement of parties.

AGENCY DISCLOSURE. At the signing of this Agreement the listing agent represents ( ) Seller ( ) Buyer, ...s selling agent represents ( ) Seller ( ) Buyer. Buyer and Seller confirm that prior to signing this Agreement disclosure of the agency relationship(s) was provided to him/her. ( ) ( ) Buyer's initials ( ) ( ) Seller's Initials

GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ...TED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall ...nti... (AM/PM) ..., 19 ..., to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST ...r to the Buyer.

J. Wesley Smith 5/15/92 1144 N 520E Orem UT 225-3626

s Signature)	(Date)	(Address)	(Phone)	(SSN/TAX ID)
s Signature)	(Date)	(Address)	(Phone)	(SSN/TAX

ONE

CEPTANCE OF OFFER TO PURCHASE: Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

JECTION. Seller hereby REJECTS the foregoing offer. _____ (Seller's Initials)

UNTER OFFER. Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and ...nts said COUNTER OFFER for Buyer's acceptance. Buyer shall have until _____ (AM/PM) _____, 19 ____ to accept the terms ...fied below.

Signature)	(Date)	(Time)	(Address)	(Phone)	(SSN/TAX ID)
Signature)	(Date)	(Time)	(Address)	(Phone)	(SSN/TAX ID)

ONE:

EPTANCE OF COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER

ECTION. Buyer hereby REJECTS the COUNTER OFFER. _____ (Buyer's Initials)

INTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

Signature)	(Date)	(Time)	(Buyer's Signature)	(Date)	(Time)

DOCUMENT RECEIPT

aw requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed).

acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

E OF SELLER SIGNATURE OF BUYER

Date Date

Date Date

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.

REALTOR®

GENERAL PROVISIONS
(Sections)

ICLUDED ITEMS. Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property, plumbing, heating, nditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, win- nd door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmit- fencing, trees and shrubs.

NSPECTION. Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as roduction. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, nspection shall be allowed by Seller but arranged for and paid by Buyer.

ELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall ught current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in ctory working condition at closing.

ONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adquate supply of wate ied use of the well or wells is authorized by a state permit or other legal water right.

ONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller knowledge of any needed repairs and it meets all applicable government health and construction standards.

CCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise erest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally e the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, nest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth ion 7 herein, alternatives allowed herein shall become null and void.

TLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion eliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. ter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agree- closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

TLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and umbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money nless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any ation charge.

STING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing f all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior g, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

ANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new le into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

UTHORITY OF SIGNATORS. If Buyer or Selle orporation, partnership, trust, estate, or other entity, rson executing this Agreement on its behalf warrants her authority to do so and to bind Buyer or S.

OMPLETE AGREEMENT — NO ORAL AGREEMENTS. This instrument constitutes the entire agreement between the parties and supersedes and cancels any prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agree This Agreement cannot be changed except by mutual written agreement of the parties.

COUNTER OFFERS. Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreer pressly modified or excluded therein.

EFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages nstitute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition tingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, ng a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by ap- e law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an in- nder action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the t money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall rpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's curred by the principal broker in bringing such action.

BROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

ISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between te hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property closing or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair ace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

IME IS OF ESSENCE—UNAVOIDABLE DELAY. In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes; od, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing all be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter, of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and ed by all parties to the transaction.

LOSING COSTS. Seller and Buyer shall each pay one-half (½) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing urance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest umed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer ing.

EAL PROPERTY CONVEYANCING. If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those ex- herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed ing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real contract therein.

OTICE. Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence vent with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given matically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the r the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice.

ROKERAGE. For purposes of this Agreement, any references to the term, "Brokerage" shall mean the respective listing or selling real estate office.

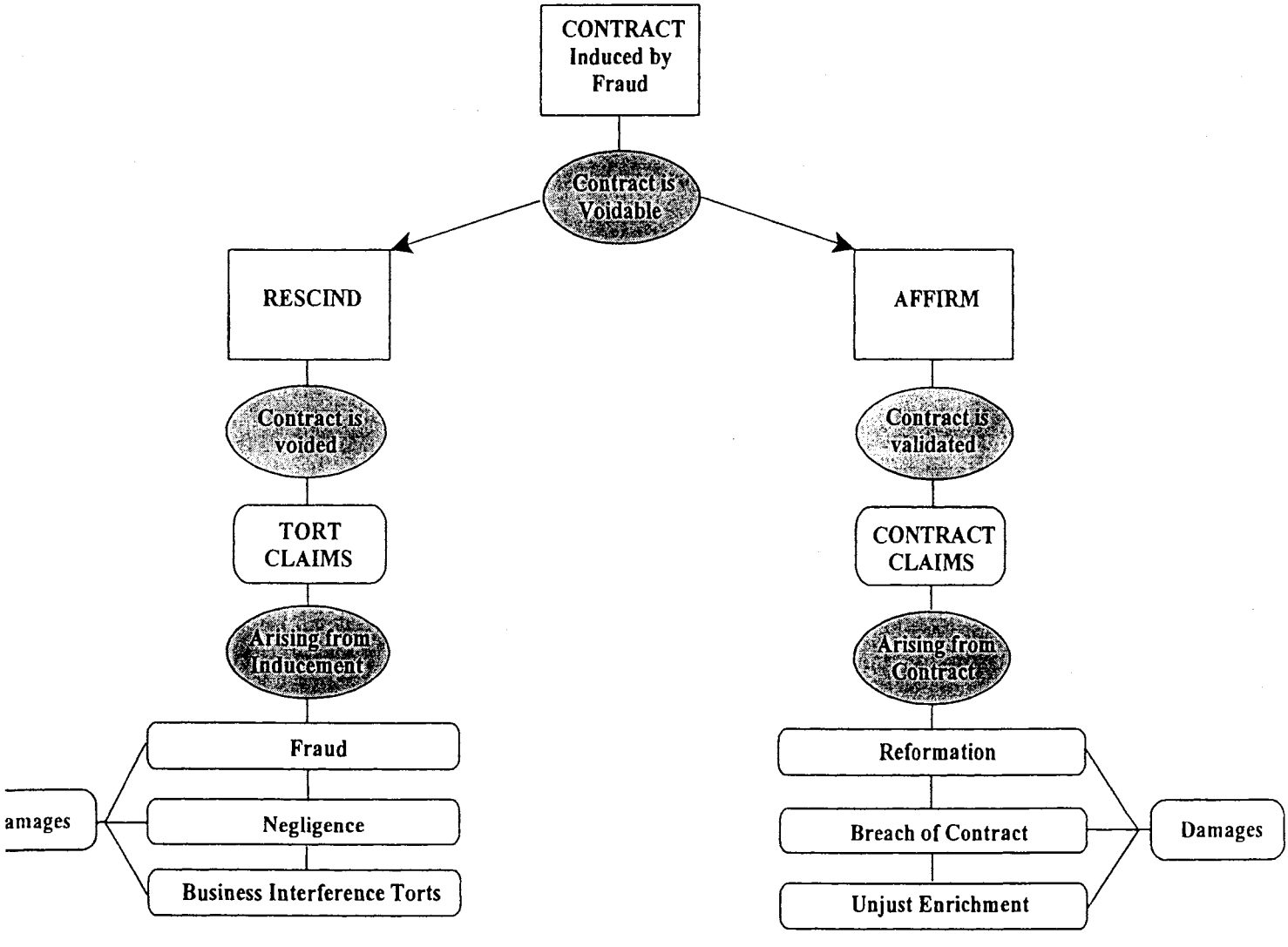
AYS. For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

FOUR OF A FOUR PAGE FORM.

Appendix E

APPENDIX E

LEGAL ANALYSIS
FOR
FRAUDULENTLY INDUCED CONTRACT CLAIMS



Appendix F

APPENDIX F

#	CASE NAME (Newest to Oldest)	TRIAL COURT JUDGMENT PUNITIVE\ACTUAL RATIO	APPELLATE COURT PUNITIVE\ACTUAL RATIO	REASONING
1	*Hall v. Wal-Mart Stores, Inc.*, 959 P2d 109 (Utah 1998).	$25,000\$19,800 1.2\1	Affirmed	Within established range
2	*Crookston v. Fire Insurance Exchange*, 860 P.2d 937 (1993) (Crookston II).	$4,000,000\$815,826 4.9\1	Affirmed	Trial Court weighed the factors
3	*Ong International Inc. v. 11th Avenue Corporation*, 850 P.2d 447 (1993).	$1,800,000\$2,405,022 1\1.3	Affirmed	Within established range
4	*Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991) (Crookston I).	$4,000,000\$815,826 4.9\1	Remanded for redetermination	Punitive damages presumptively excessive
5	*Van Dyke v. Mtn. Coin Machine Distrs., Inc.*, 758 P.2d 962 (Utah App. 1988).	$37,000\$250 148\1	$12,500\$250 50\1	Punitive damages remitted, grossly excessive
6	*Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985).	$500,000\$487,200 1.2\1	Affirmed	1\1 not excessive
7	*Jensen v. Pioneer Dodge Center, Inc.*, 702 P.2d 98 (Utah 1985).	$100,000\$1,234 81\1	Remanded for redetermination	Punitive damages grossly disproportionate
8.	*Synergetics v. Marathon Ranching Co.*, 701 P. 2d 1106 (Utah 1985)	$200,000\$400,000	Affirmed	½\1 not excessive
9	*Bundy v. Century Equipment Company, Inc.*, 692 P.2d 754 (Utah 1984).	$25,000\$2,133 11.72\1	Remanded for redetermination	11.7\1 grossly excessive
10	*Cruz v. Montoya*, 660 P.2d 723 (Utah 1983).	$12,000\$9000 1.3\1	$6000\$9000 .75\1	Punitive damages remitted as excessive
11	*First Sec. Bank of Utah, N.A. v. J.B.J. Feedyards, Inc.*, 653 P.2d 591 (Utah 1982).	$100,000\$25,000 3\1	$50,000\$25,000 2\1	Punitive damages remitted as excessive

Demonstrative Aid No. 5
May 26, 2000 Hearing on Post-Trial Motions
Diversified Holding, L.C. v. Turner, et al.
Civil No. 930400136
Judge James Taylor

Appendix G

APPENDIX G

JUDGMENT LIEN AMENDMENTS

1999 GENERAL SESSION

STATE OF UTAH

AN ACT RELATING TO THE JUDICIAL CODE; PROVIDING FOR THE TERMINATION OF JUDGMENT LIENS WHICH ARE APPEALED UPON THE FILING OF ADEQUATE SECURITY; AND MAKING TECHNICAL CHANGES.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

78-22-1, as last amended by Chapter 327, Laws of Utah 1998

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-22-1** is amended to read:

78-22-1. Duration of judgment -- Judgment as lien upon real property -- Abstract of judgment -- Small claims judgment not lien -- Appeal of judgment.

(1) Judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.

(2) Prior to July 1, 1997, except as limited by [~~Subsection~~] Subsections (4) and (5), the entry of judgment by a district court is a lien upon the real property of the judgment debtor, not exempt from execution, owned or acquired during the existence of the judgment, located in the county in which the judgment is entered.

(3) Prior to and after July 1, 1997, an abstract of judgment issued by the court in which the judgment is entered may be recorded in any court of this state and shall have the same force and effect as a judgment entered in that court.

(4) Prior to July 1, 1997, and after May 15, 1998, a judgment entered in the small claims division of any court shall not qualify as a lien upon real property unless abstracted to the civil division of the district court and recorded in accordance with Subsection (3).

(5) If any judgment is appealed and the judgment debtor files an undertaking with the court hearing the appeal to secure the full amount of the judgment in a form and amount approved by the court, the lien created by Subsection (2) shall be terminated.

with the clerk of the court
~~the~~ deposite of cash or other security ~~as of the date of the~~

Proposed amendment to U.C. A. § 78-22-1

Stet

(5) In the event any presently existing or future judgment has been or is appealed, upon ~~provision of an undertaking~~ in a form and amount deemed sufficient by the court to secure the full amount of the judgment, the lien created by this section terminates.

, together with ongoing interest and other anticipated damage or costs including attorneys fees and costs on appeal,

Upon the deposite of such cash or other security with the clerk of the court, the court shall enter an order acknowledging the termination of the lien under this section and the prevailing party shall be deemed to have a perfected lien in the deposited cash or other security, as of the date of the original judgment.

JUDGMENT LIEN AMENDMENTS

1999 GENERAL SESSION

STATE OF UTAH

AN ACT RELATING TO THE JUDICIAL CODE; PROVIDING FOR THE TERMINATION OF JUDGMENT LIENS WHICH ARE APPEALED UPON THE FILING OF ADEQUATE SECURITY; AND MAKING TECHNICAL CHANGES.

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(2) Prior to July 1, 1997, except as limited by [~~Subsection~~] Subsections (4) and (5), the entry of judgment by a district court is a lien upon the real property of the judgment debtor, not exempt from execution, owned or acquired during the existence of the judgment, located in the county in which the judgment is entered.

(3) Prior to and after July 1, 1997, an abstract of judgment issued by the court in which the judgment is entered may be recorded in any court of this state and shall have the same force and effect as a judgment entered in that court.

(4) Prior to July 1, 1997, and after May 15, 1998, a judgment entered in the small claims division of any court shall not qualify as a lien upon real property unless abstracted to the civil division of the district court and recorded in accordance with Subsection (3).

(5) (a) If any judgment is appealed, upon deposit with the clerk of the court where the appeal is filed of cash or other security in a form and amount considered sufficient by the court to secure the full amount of the judgment, together with ongoing interest and any other anticipated damages or costs, including attorney's fees and costs on appeal, the lien created by Subsection (2) shall be terminated as provided in Subsection (5)(b).

(b) Upon the deposit of sufficient security as provided in Subsection (5)(a), the court shall enter an order terminating the lien created by the judgment under Subsection (2) and granting the

INSERT 1:

(5) (a) If any judgment is appealed, upon deposit with the clerk of the court where the appeal is filed of cash or other security in a form and amount ~~deemed~~ considered sufficient by the court to secure the full amount of the judgment, together with ongoing interest and any other anticipated damages or costs, including attorney's fees and costs on appeal, the lien created by Subsection (2) shall be terminated as provided in Subsection (5)(b).

OK

(b) Upon the deposit of sufficient security as provided in Subsection (5)(a), the court shall enter an order terminating the lien created by the judgment under Subsection (2) and granting the judgment creditor a perfected lien in the deposited security as of the date of the original judgment.

(Drafter's File)
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Processed as a Normal Insert by kwoodwel on Friday, January 29, 1999 05:18 PM

Legislative Review Note
as of 1-28-99 10:23 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel

Appendix H

APPENDIX H

APPENDIX "H"

The following are damage calculations reflecting the three possible outcomes if any of the claims made by appellants are sustained on appeal.

A.

No Fraud Damages

a. Defendant	b. Fraud[19] (J&S)	c. Punitive	d. Ratio (c to b)	e. Negligence	f. Total (b+c+e)
Turner				$26,000.00	$26,000.00
Knapp				$22,750.00	$22,750.00
University				$-0-	$-0-
Haws				$16,250.00	$16,250.00
Total:				$65,000.00	$65,000.00

[19] This amount is joint and several with all defendants.

B.

Fraud Damages but no Double Recovery against Knapp and University

a. Defendant	b. Fraud[20] (J&S)	c. Punitive (Allocated)[21]	d. Ratio (c to b)	e. Negligence	f. Total (b+c+e)
Turner	$71,336.00	$35,424.00		$26,000.00	$97,336.00
Knapp	$71,336.00	$85,050.00		$22,750.00	$94,086.00
University	$71,336.00			-0-	$71,336.00
Haws	$71,336.00	$20,943.00		$16,250.00	$87,586.00
Total:	$71,336.00	$142,672.00	2 to 1	$65,000.00	$279,008

[20] This amount is joint and several with all defendants.

[21] Punitive damages are allocated here in the same ratio that the trial judge allocated punitive damages amongst the defendants.

C.

Fraud Damages but Includes Double Recovery against Knapp and University

a. Defendant	b. Fraud[22] (J&S)	c. Punitive (Allocated)[23]	d. Ratio (c to b)	e. Negligence	f. Total (b+c+e)
Turner	$71,336.00	$28,223.00		$26,000.00	$125,559.00
Knapp	$71,336.00	$67,761.00		$22,750.00	$161,847.00
University	$71,336.00	$29,002.00		$-0-	$100,338.00
Haws	$71,336.00	$17,686.00		$16,250.00	$105,272.00
Total:	$71,336.00	$142,672.00	2 to 1	$65,000.00	$279,008.00

[22] This amount is joint and several with all defendants.

[23] Punitive damages are allocated here in the same ratio that the trial judge allocated punitive damages amongst the defendants.